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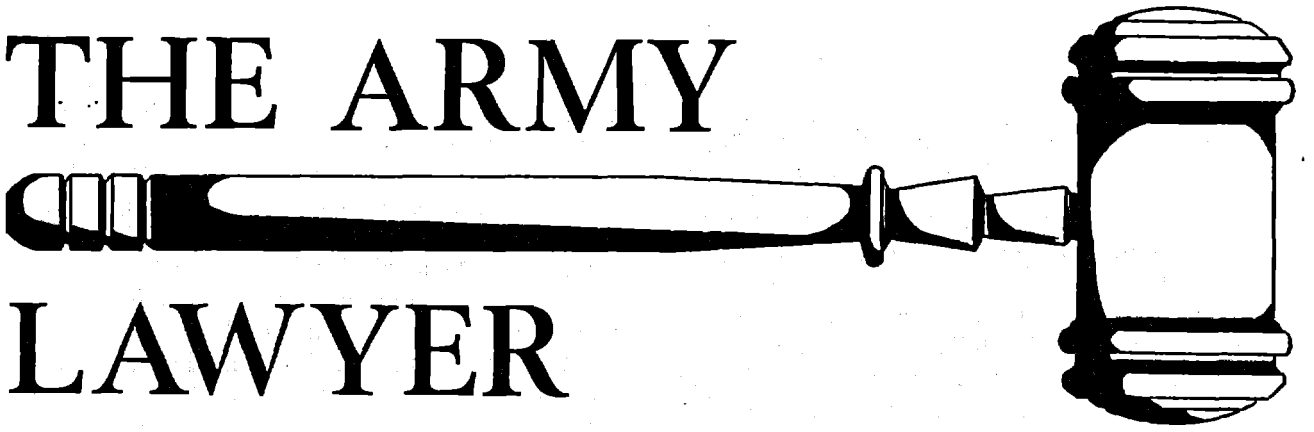

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Legislative and Judicial Developments Under the Uniformed Services Former Spouses' Protection Act

Major Charles W. Hemingway
Instructor, Administrative & Civil Law Division, TJAGSA
and
Ms. Emily Daniel
Legal Intern, Administrative & Civil Law Division, TJAGSA

It has been less than a year since the Uniformed Services Former Spouses' Protection Act[1] took effect, legislatively overruling *McCarty v. McCarty*,[2] and Congressional action has already begun to generate much judicial and legislative activity.

In *McCarty*, the Supreme Court held that Congress intended that a military retiree's pension be his or her separate property and not a property interest subject to division upon dissolution of the retiree's marriage. Writing for the majority, Justice Blackmun recognized the hardship and inequity the decision would cause for many former spouses of military retirees but suggested that, in light of the legislative history

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[1]Pub. L. No. 97-252, Title X, §§ 1001-1006, 96 Stat. 730 (Sept. 8, 1982), codified at 10 U.S.C.A. § 1408 (West 1983) [hereinafter cited as the Act].

[2]453 U.S. 210 (1981).

concerning military retired pay, it would be up to Congress, not the Court, to change the law.[3]

Within fifteen months of the Court's June 25, 1981 pronouncement in *McCarty*, Congress responded with the Uniformed Services Former Spouses' Protection Act, which took effect February 1, 1983.[4] The Act, however, raises new questions and new issues which state courts and legislatures are just beginning to sort through. It is the purpose of this article to discuss some of the legislative and judicial developments concerning division of military retired pay which have occurred since passage of the Act.

I. Background

McCarty involved a property settlement in a divorce action between Colonel Richard McCarty, an Army officer, and his then-wife, Patricia McCarty. Colonel McCarty had served eighteen years on active duty when he filed for divorce in California. He was two years short of qualifying for retirement. Under California law, an ex-spouse is given an equal share of any property determined to be community property.[5] Colonel McCarty, however, requested that the court award any entitlement he had to a retirement pension to him as his separate property.[6] Although Colonel McCarty's military pension right at the time he filed for divorce could have been characterized as "non-vested" in that he had not yet qualified for retirement,[7] the California Superior Court held that any military pension entitlement he did have was subject to division as quasi-community property.[8] Mrs. McCarty was eventually awarded forty-five percent of the pension.[9] After the California

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[3]*Id.* at 236.

[4]Pub. L. No. 97-252, § 1006. The legislation specified that the Act would take effect on the first day of the month which began more than 120 days after passage.

[5]Cal. Civ. Code Ann. § 4800(a) (West Supp. 1981).

[6]453 U.S. at 217.

[7]Having completed 18 years of service, Colonel McCarty had reached in military parlance what is known as "the 18-year lock-in." *See* 10 U.S.C. § 3913(B) (1976), which had been superseded by 10 U.S.C. § 637(a)(5) (1976). This means that absent some contingency such as death or discharge for misconduct, Colonel McCarty was guaranteed remaining on active duty for the 20 years necessary to qualify for a pension under 10 U.S.C. § 3911 (1976).

[8]453 U.S. at 218.

[9]*Id.* The court reached this figure by dividing in half the number of years needed to qualify for the pension that was earned during the marriage. For example, Colonel McCarty had served 18 of 20 years needed to qualify for retirement. Thus, 18/20ths (90%) of the pension was earned during the marriage. The court determined that half that percentage (90%/2=45%) represented Mrs. McCarty's community share.

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Supreme Court upheld the lower court determinations and denied a petition for rehearing, the Supreme Court heard the case.

Colonel McCarty argued that military retired pay is not really deferred compensation for services performed while on active duty but current compensation for reduced services.[10] For example, a retired officer remains subject to recall to active duty at any time,[11] and continues to be subject to the Uniform Code of Military Justice.[12] Thus, Colonel McCarty argued that any right he had to a retirement pension should not be subject to division under California law as "quasi-community" property because he would not have earned it during his marriage. The Supreme Court, however, ruled in Colonel McCarty's favor without ever deciding whether or not states would be required to hold that retired pay is reduced compensation. The Court found ample authority in the statutory scheme governing the armed forces to hold that congressional intent in granting a "personal entitlement" to retired service members preempted the states from treating a military pension as marital property.[13]

II. The Uniformed Services Former Spouses' Protection Act

One common misconception about the Act concerns the manner in which Congress removed federal preemption. Congress could have mandated that any former spouse of a military retiree who met certain qualifications, such as length of marriage, would be automatically entitled to a portion of the military pension upon divorce. Many persons who have not examined the Act are under the impression that Congress did exactly that. Congress, however, did no such thing. Rather, the Act "permits" state courts to treat retired pay as either the separate property of the retiree or as property of the spouse or former spouse.[14] Prior to *McCarty*, many states routinely awarded a former spouse an interest in military retired pay.[15] Other states, pre-*McCarty*, had specific case law that the military pension was not property subject to division in a divorce action.[16] Under the Act, state courts which once declined to divide retired pay because of federal preemption are now free to award a spouse or former spouse a portion of the military pension as either his or her separate property, or as alimony or child support.[17] Alternatively, the court could follow the jurisdiction's pre-Act case law and refuse to award a spouse or former spouse any portion of the retirement benefit.

This has led at least two states to enact legislation which affirmatively spells out where military retirement pensions fit within property distribution schemes in divorce actions. Maryland has specified that military pensions are to be considered in the same manner as any other pension or retirement benefit.[18] Under Maryland's property distribution scheme, other pension or retirement benefits are considered divisible.[19] North Carolina has amended its statutory equitable distribution scheme to specifically include vested military retirement pensions as within the definition of marital property subject to division upon divorce.[20] Nonvested pension or retirement rights are con-

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[10] *Id.* at 221-22.

[11] Pub. L. No. 96-513, § 106, 94 Stat. 2868 (Dec. 12, 1980), codified at 10 U.S.C.A. § 688 (West 1983).

[12] *See* 10 U.S.C. § 802(4) (1976).

[13] 453 U.S. at 221-24. The Court noted that in prior decisions it had construed military retired pay to be reduced compensation but that it was not necessary in deciding *McCarty* to rule whether federal law precluded the states from characterizing retired pay as deferred compensation. Recently, the Family Court of New Castle County, Delaware, ruled that retired pay is deferred, not current but reduced compensation. *See* Ronald Z. v. Ellen M., 10 Fam. L. Rep. (BNA) 1071 (Nov. 29, 1983).

[14] 10 U.S.C. § 1408(c)(1) (1976).

[15] As, for example, the California court did in *McCarty*. *See also In re* Fithian, 10 Cal. 3d 592, 517 P.2d 448, 111 Cal. Rptr. 369 (1974).

[16] *See e.g.*, Kabaci v. Kabaci, 373 So. 2d 1144 (Ala. App. 1979).

[17] 10 U.S.C.A. § 1408(a)(2) (West 1983).

[18] Act of July 1, 1983, SB No. 765, § 2, 1983 Md. Laws (to be codified at Md. Cts. & Jud. Proc. Code Ann. § 3-6A-07 (1983)).

[19] Md. Cts. & Jud. Proc. Code Ann. § 3-6A-01(e). *See* Ohm v. Ohm, 49 Md. App. 392, 431 A.2d 1371 (1981).

[20] Act of July 14, 1983, ch. 758, 1983 N.C. Sess. Laws (to be codified at N.C. Gen. Stat. § 50-20(b) (1983)).

sidered separate property under the North Carolina law.[21] The law applies only to actions for absolute divorce filed on or after August 1, 1983.[22]

The South Carolina Supreme Court has taken a different approach, however, and became the first jurisdiction to reject division of the military pension as separate property in light of the Uniformed Services Former Spouses' Protection Act.[23] The court noted:

> The statute *permits* states to divide military retired pay as property between parties in a divorce. However, the final decision concerning the treatment of military retirement funds remains with the states. We may treat them as income to the retired serviceman and therefore as a factor in determining alimony, or we may treat them as marital property subject to equitable division. We prefer to treat the fund as income and *not* marital property.[24]

It remains to be seen whether other states which have declined to consider the military pension divisible as separate property in divorce actions because of federal preemption will take advantage of this Congressional intervention.

Effect of the Act on Active Duty Personnel

Recall that Colonel McCarty had only served eighteen years on active duty at the time he filed for divorce, although during the pendency of the action he completed twenty years of service and retired. The California court, prior to Colonel McCarty's retirement, could have awarded Mrs. McCarty an interest in the present value of Colonel McCarty's eighteen years of service, taking into account that if, for whatever reason, Colonel McCarty failed to complete twenty years of service, any interest awarded would be lost.[25] Instead, the court opted for a second alternative and retained jurisdiction until Colonel McCarty completed twenty years of service, after which another hearing was held to determine Mrs. McCarty's interest.[26]

The Act recognizes that a court could award a former spouse an interest in the retired pay of a service member who has completed twenty years of active duty, and thus has "vested" pension rights, but chooses to remain on active duty. Had Colonel McCarty chosen to remain on active duty after he became eligible to retire, however, could the court have ordered him to retire to begin collecting the pension? The Act anticipates that issue and answers it in the negative with a specific prohibition against such court orders.[27] The Act also specifies that in cases where a former spouse would qualify for an automatic allotment from the appropriate military finance center, but the service member chooses to remain on active duty, the automatic payments from the service member's pay account will not begin until ninety days after the service member retires.[28]

The Act also contains an interesting jurisdictional provision affecting active duty service members. Before a court can act to divide the military pension, it must have jurisdiction over the service member by virtue of his or her consent to the jurisdiction of the court, his or her domicile within the jurisdiction of the court, or residence within the jurisdiction of the court other than because of military assignment.[29] Colonel McCarty was serving on active duty in California pursuant to military orders when his divorce action commenced. The California court specifically found that he had consented to its jurisdiction by initiating the divorce action and that it was thereby empowered to adjudicate any property interest Mrs. McCarty might have in his retired pay. Colonel McCarty did not

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[21] *Id.* at § 4 (to be codified at N.C. Gen. Stat § 50-20(c)(5)).

[22] Act of July 18, 1983, ch. 811, 1983 N.C. Sess. Laws.

[23] Brown v. Brown, 302 S.E.2d 860 (S.C. 1983).

[24] *Id.* at 861.

[25] 453 U.S. at 217.

[26] *Id.* at 218.

[27] 10 U.S.C.A. § 1408(c)(3) (West 1983).

[28] *Id.* § 1408(d)(1).

[29] *Id.* § 1408(c)(4).

contest that finding on appeal.[30] But under the Act, had it been Mrs. McCarty who initiated the action, the California court would have apparently been precluded from awarding Mrs. McCarty a portion of Colonel McCarty's retired pay for want of jurisdiction based on the "other than because of military assignment" provision. The provision does not apply to retirees.

There are additional implications for active duty personnel who have not yet qualified for retirement based on a growing number of cases where courts have awarded ex-spouses an interest in nonvested, civilian pension plans. For example, in *Damiano v. Damiano*,[31] the New York Supreme Court Appellate Division ruled that a nonemployee ex-spouse had a right to nonvested pension benefits of the employee ex-spouse under New York's equitable distribution statute. A recent trend in the law is to reject any distinction in determining equitable distribution of pension benefits on the basis of whether they are vested or nonvested.[32]

The implications this trend might have on junior, but career-oriented military personnel is exemplified by a recent case in which the Utah Supreme Court awarded an ex-wife an interest in a portion of the ex-husband's civil service pension even though the husband, who was a civilian Air Force employee, would not qualify for retirement for another fifteen years.[33] Now that the Uniformed Services Former Spouses' Protection Act is law, one may ponder what the result would have been if the employee had been a junior Air Force officer or enlisted man with five years in service and fifteen years left to retirement eligibility.

Rights Given to Former Spouses

While the Uniformed Services Former Spouses' Protection Act did not grant former spouses an automatic entitlement to a portion of the military pension, the Act did carve out some rights for certain former military spouses where the court does award a share of the retired pay. One is a right to receive payment directly from the military finance center in several situations. First, if the award is a separate property award and the former spouse was married to the service member or retiree for at least ten years, during which time the service member or retiree performed at least ten years of service creditable toward retirement, the former spouse is entitled to receive an automatic allotment.[34] Thus, a former spouse who does not meet both of those tests would not qualify for an automatic allotment even where the award is characterized as her separate property. If that same ex-spouse received the award as either alimony or child support, the ten-year restrictions do not apply and he or she would be entitled to an automatic allotment.[35] There is also a cap of fifty percent that a finance center may pay under the direct payment provisions.[36] If Colonel McCarty, for example, had been subject to the Act and the California court had awarded Mrs. McCarty fifty-five percent of his retired pay, she could have collected only fifty percent from the finance center via a direct payment and it would have been Colonel McCarty's responsibility to pay the remaining five percent.

A former spouse is also given the right to garnish a retiree's pay where the retiree has failed to comply with provisions of a property award.[37] Perhaps a further example of the confusion which has arisen where former spouses are concerned is a recently enacted Maine statute which is titled "An Act to Provide Equity

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[30]453 U.S. at 218-219.

[31]94 A. D.2d 132, 463 N.Y.S.2d 477 (App. Div. 2d Dep't 1983).

[32]King v. King, 9 Fam. L. Rep. (BNA) 2273 (Mar. 8, 1983).

[33]Woodward v. Woodward, 9 Fam. L. Rep. (BNA) 2063 (Nov. 30, 1982).

[34]10 U.S.C.A. § 1408(d)(2) (West 1983).

[35]A person searching the Act for an express provision concerning direct payment in alimony or child support cases will not find one. Rather, § 1408(a)(2)(B) authorizes courts to award the retired pay entitlement as separate property, alimony or child support. § 1408(d)(1) authorizes direct payments but § 1408(d)(2) adds the 10-year limitation where the entitlement is awarded as separate property. The limitation in § 1408(d)(2) does not apply to alimony or child support.

[36]10 U.S.C.A. § 1408(e)(1) (West 1983).

[37]*Id.* § 1408(d)(5).

for Former Military Spouses",[38] but which may have the opposite effect in some garnishment cases. The new Maine statute permits garnishment of up to fifty percent of the disposable retired pay for alimony and child support orders. But under the federal garnishment statute, a former spouse may garnish up to 55, 60 or 65 percent of a retiree's disposable retired pay depending on whether the retiree has a second set of dependents and how far behind in alimony and child support payments the retiree has fallen.[39] As the federal garnishment scheme contains a provision which directs federal agencies honoring garnishment writs to compare state law with federal law and apply the law which is more favorable to the service member or retiree,[40] the application of the Maine statute may well mean that many former spouses will be hindered rather than aided.

Finally, an unremarried former spouse who was married to a service member or retiree for at least twenty years during which time the service member or retiree served at least twenty years of creditable service toward retirement, has the right to medical,[41] commissary, and post exchange privileges,[42] subject to certain retroactivity restrictions discussed below.

Retroactivity Provisions

An area of crucial concern is the retroactive application of the Act. Just as there is misunderstanding where substantive areas of the statute are concerned, there is confusion over its retroactivity provisions. Basically, the Act preserves the status quo as it existed prior to *McCarty*. If a court, prior to *McCarty*, awarded a former spouse a portion of retired pay as his or her separate property, but the service member or retiree, post-*McCarty*, obtained a modification voiding the award of retired pay based on *McCarty*, it was Congress' intent that some former spouses be entitled to enforce the original order as if the post-*McCarty* modification had not occurred.[43] The retroactivity provisions, which apply to court orders which became final before June 26, 1981,[44] pertain only to the direct payment provisions. The Act states that payments made pursuant to those provisions may be made in accordance with the court order in effect on June 26, 1981 "without regard to any subsequent modifications."[45] In the strictest sense, only former spouses who would qualify for a direct payment from a military finance center would be entitled to have a subsequent modification disregarded. All other former spouses would be bound by any subsequent modifications and would be required to seek judicial relief.

Congress intended that orders and decrees entered post-*McCarty* would be subject to modification.[46] That is, if a state court, relying on *McCarty*, declined to award a former spouse a portion of the retired pay, as a result of the Act, that former spouse could seek a modification of the order and ask that a portion of the retired pay be awarded as his or her separate property. "This retroactive application will at least afford individuals who were divorced (or had decrees modified) during the interim period between June 26, 1981 and the effective date of this legislation the opportunity to return to the courts to take advantage of this provision."[47] Whether a former spouse with a decree final before June 26, 1981 who does not qualify for the direct payment provisions is entitled to retroactive application of the Act is an issue which has been left for state courts to decide.[48]

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[38]Act of May 12, 1983, ch. 259, 1983 Me. Laws 844 (to be codified at 19 Me. Rev. Stat. Ann. § 744-A (1983)).

[39]15 U.S.C. § 1673(b)(2) (1976).

[40]5 C.F.R. § 581.402 (1983).

[41]10 U.S.C.A. § 1072(2)(F) (West 1983); Pub. L. No. 97-252, § 1004.

[42]Pub. L. No. 97-252, § 1005. Medical benefits are statutory entitlements while commissary and exchange privileges are regulatory entitlements. § 1005 directs the Secretary of Defense to promulgate regulations extending commissary and exchange privileges to qualifying former spouses.

[43]128 Cong. Rec. H5999-6000 (daily ed. Aug. 16, 1982).

[44]*McCarty* was decided June 25, 1981.

[45]Pub. L. No. 97-252, § 1006(b).

[46]*Id.*

[47]S. Rep. No. 502, 97th Cong., 2d Sess., 1982 U.S. Code Cong. & Ad. News 1555, 1611.

[48]*Id.* at 1623.

Again, the retroactivity provisions are confusing and one state (Nevada) has enacted legislation which specifies that decrees entered between June 26, 1981 and February 1, 1983 can be modified.[49] On the judicial front, two California courts have held that the Act would be retroactively applied to June 26, 1981[50] and a Delaware Family Court has permitted reopening of a post-*McCarty* order to determine divisibility of a military pension in light of passage of the Act.[51]

A remaining retroactivity matter of consequence concerns unremarried former spouses who were married at least twenty years to a service member or retiree during which time the service member served at least twenty years of military service creditable toward retirement. Only former spouses with decrees final after February 1, 1983 are entitled to medical, commissary and exchange privileges.[52] Critics have argued that this provision is inequitable for the substantial number of former spouses who meet both twenty-year tests but have decrees final before February 1, 1983. Two bills have been introduced in Congress which would remove the retroactivity barriers for these former spouses, provided certain conditions are met.[53]

III. State Divorce Law Property Distribution Schemes

Now that the Uniformed Services Former Spouses' Protection Act is in place and *McCarty* is no longer, where will courts fit military pensions within the various property distribution schemes? There are three ways marital property has traditionally been treated by the courts upon dissolution of a marriage. These are treatment of the property as community property, division of the property under a system of equitable distribution, and division of the marital property upon the basis of title alone.

Title States

With West Virginia's recent change to a system of equitable distribution, there is arguably no state which continues to follow the "title" scheme of distribution of marital assets.[54] Under the "title" system of distribution, courts lacked general or equitable power to distribute property upon divorce, except for jointly held property; title alone controlled.[55] A 1981 comprehensive review of the various state property distribution schemes identified Virginia, West Virginia and Mississippi as the only remaining states using the "title" method.[56] Virginia enacted an equitable distribution statute in 1982,[57] and Mississippi, by case law, has evidently shifted to a system which embraces equitable distribution considerations.[58]

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[49]9 Fam. L. Rep. (BNA) 2681 (Sept. 20, 1983).

[50]*In re* Hopkins, 142 Cal. App. 3d 350, 191 Cal. Rptr. 70 (1983); *In Re* Ankenman, 142 Cal. App. 3d 833, 191 Cal. Rptr. 292 (1983).

[51]Smith v. Smith, 9 Fam. L. Rep. (BNA) 2371 (Apr. 19, 1983).

[52]Pub. L. No. 97-252, § 1006(d).

[53]S. 1613, 98th Cong., 1st Sess (1983). The bill was introduced July 11, 1983, by Sen. Paul Trible of Virginia. Former spouses who have a disease or disability attributable to or arising from the nature or location of the service performed by the retiree while on active duty would be entitled to medical privileges regardless of the date of the decree. They would also be entitled to medical privileges for mistreatment at a military medical facility, but only for health care rendered after the effective date of the bill. They would also be given commissary and exchange privileges regardless of the date of the decree. H.R. 4076, 98th Cong., 1st Sess (1983). This bill was introduced October 4, 1983 by Rep. Harry M. Reid of Nevada. It's provisions are similar to those in Sen. Trible's bill.

[54]LaRue v. LaRue, 394 S.E.2d 312 (W.Va. 1983).

[55]Freed & Foster, *Divorce In the Fifty States: An Overview As of August 1, 1981*, 7 Fam. L. Rep. (BNA) 4049, 4056 (Oct. 20, 1981) [hereinafter cited as Freed & Foster].

[56]*Id.*

[57]Va. Code § 20-107.3 (1982). Under the new Virginia equitable distribution scheme, the present value of pension or retirement benefits, whether vested or nonvested, is considered martial property. However, any court award of such benefits is not effective until the person against whom the order is entered actually begins receiving the benefits and is limited to 50% of the cash benefit actually received by such person.

[58]Mississippi has been a tough jurisdiction for those interested in marital property distribution to analyze because the state does not have a statutory scheme for distribution of property in divorce cases. But guidance can be gleaned from judicial pronouncements. It has been held in Mississippi

Community Property States

Eight states have community property laws.[59] Under community property schemes, all property acquired after marriage is considered jointly owned and upon dissolution of the marriage, the parties are generally entitled to share equally in it. Each spouse is "deemed to make an equal contribution to the marital enterprise and is therefore entitled to share equally in its assets."[60] California, Louisiana, Idaho and New Mexico generally divide community property equally, while Texas, Washington, Arizona and Nevada, along with Puerto Rico, follow an equitable distribution scheme akin to that used in many common law equitable distribution systems.[61]

The formula used by community property states to divide the pension equally is illustrated by the case of *In re Marriage of Fransen.*[62] The Fransens married in 1943. At that time, Mr. Fransen had already served three years in what eventually was a twenty-five-year naval career. Several months after Mr. Fransen began receiving retired pay, the parties divorced. For two years, approximately ten percent of their marriage, they were domiciled in California. Based on those facts, the lower court awarded Mrs. Fransen one-half (five percent) of the ten percent of her ex-husband's military pension that the court determined had been earned in California. On appeal, however, it was held that the remaining amount of the pension, earned during the marriage but outside of California, was also subject to an equal division under California law as quasi-community property.[63] The court compared the number of years that Mr. Fransen served before his marriage (three) with his total years of service (twenty-five) and found that he had already earned approximately twelve percent of the pension before he married. The court then awarded Mrs. Fransen half of the remaining eighty-eight percent.

Common Law Equitable Distribution States

Equitable distribution states recognize that a spouse "who has made a material economic contribution toward the acquisition of property that is titled in the name of or under the control of the other spouse"[64] should be entitled to claim an equitable interest in such property in a divorce proceeding. A court in an equitable distribution state can award this equitable interest in two ways. First, it can characterize an asset which is not specifically titled in the name of one spouse, but is under his or her control, as marital property.[65] Second, where the court cannot order the conveyance of separate property titled in the name of one, but not both parties, the courts may still consider the property as marital property and grant a monetary award to the other spouse based upon the equities and the rights and interests of each party.[66]

Within states with equitable distribution schemes, some have no specific statute, but have shifted to such a scheme by judicial fiat. These states are West Virginia,[67] Florida,[68] Mississippi,[69] and South Carolina.[70] These states util-

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that a wife may receive funds from her husband's assets to compensate her for economic services and homemaker services. *See,* Reeves v. Reeves, 410 So. 2d 1300 (Miss. 1982). There was language in a 1981 case that the court which granted a divorce was in the best position to "adjudicate and adjust the equitable factors existing between the parties." Sartin v. Sartin, 405 So. 2d 84, 86 (Miss. 1981). Additionally, property settlement agreements entered into among parties to a Mississippi divorce action have been determined binding on the parties "if fair, equitable and supported by consideration." Weeks v. Weeks, 403 So. 2d 148, 149 (Miss. 1981).

[59]The eight states are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington.

[60]453 U.S. at 216-17.

[61]142 Cal. App. 3d 419 (1983).

[62]*Id.* at 433.

[63]Freed & Foster, *supra* note 55.

[64]LaRue v. LaRue, 304 S.E.2d 312 (W.Va. 1983).

[65]A military retirement pension is a good example. Although not technically titled in the name of the retiree, the retiree has earned the right to receive these benefits by virtue of military service. The Act, however, frees the courts to characterize the pension as marital property and award a former spouse a separate interest.

[66]*See* Va. Code § 20-107.3 (1982).

[67]LaRue v. LaRue, 304 S.E.2d 312 (Fla. 1983).

[68]Canakaris v. Canakaris, 382 So. 2d 1197 (Fla. 1980).

[69]Reeves v. Reeves, 410 So. 2d 1300 (Miss. 1982).

[70]Burgess v. Burgess, 286 S.E. 2d 142 (S.C. 1982).

ize the concept of a "special equity doctrine" which recognizes a spouse's right to equitable considerations where the spouse has made significant contributions, whether as the result of rendering services as a homemaker or otherwise, to the acquisition of property during the marriage.[71] But the predominant scheme is a statutory equitable distribution scheme, the most common of which permits a court to make an equitable distribution of marital property based on a detailed list of factors enumerated within the statute.[72]

The most common equitable considerations are: the contribution of each party to the acquisition of the asset; the role of each party in the dissipation of any marital assets; whether the asset has appreciated or depreciated in value; the difference between marital and nonmarital property; the value of the property set apart to each spouse; the duration of the marriage; antenuptial agreements; age, health, employability, liabilities, amount and sources of income; the needs of each of the parties; the increased needs of the spouse having custody of the children; and the contribution of a spouse as homemaker in the family unit.[73] The Virginia statute is a good example of a recent equitable distribution scheme. The factors a Virginia court now take into consideration in making an award of marital property include: the contributions, monetary and nonmonetary, of each party to the well-being of the family; the contributions, monetary and nonmonetary, of each party in the acquisition, care and maintenance of the marital property of the parties; the duration of the marriage; the circumstances or factors which contributed to the breakup of the marriage, including marital fault; how and when specific items of marital property were acquired; the ages, physical and mental condition of the parties; the debts and liabilities of each spouse, the basis for such debts and liabilities, and whether there is property which may serve as security for such debts and liabilities; the present value of pension or retirement benefits, whether vested or nonvested; the liquid or nonliquid nature of all marital property, the tax consequences to each party, and any other factors the court deems necessary to arrive at a fair and equitable monetary award.[74]

One equitable distribution state, Wisconsin, has a statute which creates a presumption that marital property is to be divided equally.[75] In practice, however, a Wisconsin court may consider other factors it determines relevant to arrive at an equitable division of the property.[76] A variation on the Wisconsin approach is found in Arkansas, where the court is directed to divide all marital property equally at the time a divorce decree is entered unless the court finds that such a division would be inequitable, in which case the court is free to make any division it determines equitable, based on eight enumerated factors.[77] These include many of the considerations discussed above, but add occupation and vocational skills.[78]

Other considerations exist which courts will weigh, depending on the facts of a particular case. One of these is the relative degree of fault between the parties in the marriage breakup. This was a central issue in *Rust v. Rust*,[79] a case which concerned the court's consideration of the conduct of the parties in determining who got what in an equitable division of the marital property. One of the marital assets was the military pension of the husband. The case was a pre-Act case decided at a time when *McCarty* was law, so the pension was not deemed marital property subject to distribution. But the court did consider the pension as a portion of the entire marital estate. The lower court divided the property equally among the parties. Mrs. Rust asserted that she was entitled to a greater interest in the marital property based on her ex-husband's military pension and his miscon-

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[71]LaRue v. LaRue, 304 S.E. 2d 312 (Fla. 1983).

[72]Freed & Foster, *supra* note 55, 4056-57.

[73]Oliszewicz, *McCarty v. McCarty: A Former Spouse's Claim To A Service Member's Retired Pay Is Shot Down*, 13 Loy U. Chi. L.J. 555, 559 (1982).

[74]Va. Code § 20-107.3 (1982).

[75]Wis. Stat. Ann. § 767.255 (West 1981).

[76]Mack v. Mack, 108 Wis. 2d 604, 323 N.W.2d 153 (1982).

[77]Ark. Stat. Ann. § 34-1214 (1981).

[78]*Id.*

[79]321 N.W.2d 504 (N.D. 1982).

duct. On appeal she argued that he sexually molested two of his children, was an alcoholic, had contracted veneral disease from a bargirl in Japan, and had hinted that she would be better off dead. The North Dakota Supreme Court acknowledged that the conduct of the parties, among other things, should be considered under the state's equitable distribution guidelines[80] but upheld the lower court award based on Mrs. Rust's own flawed conduct, which included her hypochondria, argumentiveness, and drug use. It concluded that there was fault on both sides and, being unable to determine which party's conduct precipitated the conduct of the other, found that an equal division was warranted.

Nine states expressly exclude fault as a consideration in property distribution schemes;[81] two states have apparently excluded fault from consideration via case law;[82] and fifteen states apparently consider marital fault as a discretionary factor that may be taken into consideration in property distribution.[83]

Divisibility of Military Pensions

At the outset, the court must determine if the pension is marital or separate property. Courts in nineteen states and the Canal Zone have reached the conclusion that the military pension is marital property.[84] There are ten states with case law that the military pension is not considered marital property.[85] The remaining number of states have apparently not yet considered whether the military pension is marital property, but a number have case law that other types of pension plans, both public and private sector, are considered marital property. Minnesota, for example, has case law which holds that

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[80]*See* Ruff v. Ruff, 78 N.D. 775, 52 N.W.2d 107 (1952); Fischer v. Fischer, 139 N.W.2d 845 (N.D. 1966).

[81]Freed & Foster, *supra* note 55, at 4055. The authors identify these states as Alaska, Arizona, Colorado, Delaware, Illinois, Kentucky, Montana, Pennsylvania, and Washington.

[82]*Id.* The authors identify these states as Hawaii and New Jersey.

[83]*Id.* The authors identify these states as Alabama, Connecticut, Florida, Georgia, Idaho, Maryland, Massachusetts, Michigan, Nevada, New Hampshire, Rhode Island, South Carolina, Vermont, and Wyoming. Virginia, with its statutory provision for consideration of marital fault, should be added to the list.

[84]These states are: Alaska - Chase v. Chase, 662 P.2d 944 (Alaska 1983), *overruling*, Cose v. Cose, 592 P.2d 1230 (Alaska 1979), *cert. denied*, 453 U.S. 922 (1982); Arizona - VanLoan v. VanLoan, 116 Ariz. 272, 569 P.2d 214 (1977), but more recently, DeGryse v. DeGryse, 661 P.2d 185 (Ariz. 1983); California - *In re* Fithian, 10 Cal. 3d 592, 517 P.2d 449, 111 Cal. Rptr. 369 (1974), and *In re* Hopkins, 142 Cal. App. 3d 350 (1983); Delaware - Smith v. Smith, 9 Fam. L. Rep. (BNA) 2371 (Apr. 19, 1983), however this is a decision of the Delaware Family Court of Kent County; Hawaii - Linson v. Linson, 618 P.2d 748 (Hawaii 1981); Idaho - Ramsey v. Ramsey, 96 Idaho 672, 535 P.2d 53 (1975); Illinois - *In re* Marriage of Schissel, 292 N.W.2d 421 (Ill. 1980); Louisiana - Swope v. Mitchell, 324 So. 2d 461 (La. 1975), but note that in Debon v. Debon, 390 So. 2d 937 (La. App. 1980), *aff'd*, 404 So. 2d 904 (La. 1981), the Louisiana Supreme Court, following Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979), ruled that federal law preempted Louisiana from dividing military retired pay—a decision in doubt since passage of the Act; Michigan - Chisnell v. Chisnell, 82 Mich. App. 699, 267 N.W.2d 155 (1978) and Grotelueschen v. Same, 113 Mich. App. 395, 318 N.W.2d 227 (1982) a decision in which the Michigan court expressed its dissatisfaction with *McCarty;* Missouri - Daffin v. Daffin, 567 S.W.2d 672 (Mo. Ct. App. 1978), and *In re* Marriage of Weaver, 606 S.W.2d 243 (Mo. Ct. App. 1980); Montana - *In re* Marriage of Miller, 37 Mont. 556, 609 P.2d 1185 (1980), *vacated and remanded*, Miller v. Miller, 453 U.S. 918 (1981); New Jersey - Kruger v. Kruger, 139 N.J. Super. 413, 354 A.2d 340 (1976), *aff'd*, 73 N.J. 464, 375 A.2d 659 (1977); New Mexico - LeClert v. LeClert, 80 N.M. 235, 453 P.2d 755 (1969); Oregon - Marriage of Vinson, 48 Or. App. 283, 616 P.2d 1180 (1980); Texas - Cearley v. Cearley, 544 S.W.2d 661 (Tex. 1976) and Cameron v. Cameron, 641 S.W.2d 210 (Tex. 1982); Washington - Wilder v. Wilder, 85 Wash. 2d 364, 534 P.2d 1355 (1975), Payne v. Payne, 82 Wash. 2d 573, 512 P.2d 736 (1973), and *In re* Smith, 9 Fam. L. Rep. (BNA) 2705 (Oct. 4, 1983); Wisconsin - Leighton v. Leighton, 81 Wis. 2d 620, 261 N.W.2d 457 (1978); Canal Zone - Bodenhorn v. Bodenhorn, 567 F.2d 629 (5th Cir. 1978).

[85]These states are: Alabama - Kabaci v. Kabaci, 373 So. 2d 1144 (Ala. Civ. App. 1979); Arkansas - Fenney v. Fenney, 259 Ark. 858, 537 S.W.2d 367 (1976) and Paulsen v. Paulsen, 269 Ark. 523, 601 S.W.2d 873 (1980); Colorado - *In re* Marriage of Ellis, 36 Colo. App. 234, 538 P.2d 1347 (1975), *aff'd*, Ellis v. Ellis, 191 Colo. 317, 552 P.2d 506 (1976) and *In re* Marriage of Camarata, 602 P.2d 907 (Col. App. 1979); Indiana - Hiscox v. Hiscox, 385 N.E.2d 1166 (Ind. App. 1979) and Matter of Harter, 10 Bankr. (West) 272 (1981); Kentucky - Russell v. Russell, 605 S.W.2d 33 (Ky. App. 1980), *cert. denied*, 453 U.S. 922 (1981); Maryland - Hill v. Hill, 47 Md. App. 460, 424 A.2d 783 (1981); Nebraska - Howard v. Howard, 196 Neb. 351, 242 N.W.2d 884 (1976) and Witcig v. Witcig, 206 Neb. 307, 292 N.W.2d 788 (1980); New Hampshire - Baker v. Baker, 421 A.2d 998 (N.H. 1980); Oklahoma - Baker v. Baker, 546 P.2d 1325 (Okla. 1976); South Carolina - Brown v. Brown, 302 S.E.2d 860 (S.C. 1983).

private pensions are considered marital property. In arriving at that decision the Minnesota Supreme Court cited cases from several states which involved military retirement pensions,[86] and in a recent decision reaffirmed the prospect that if ever faced with a military pension case, it would undoubtedly declare a military pension to be marital property.[87] Similarly, Utah has case law holding that a federal civil service pension was marital property.[88]

Of the states which do not consider the military pension to be marital property subject to division upon divorce, only South Carolina has reaffirmed that position after passage of the Uniformed Services Former Spouses' Protection Act.[89] Maryland has legislatively overruled its prior decision in *Hill v. Hill*[90] that military pensions were the separate property of the service member or retiree. *Hill* was a decision which followed *McCarty*, and with enactment of the Uniformed Services Former Spouses' Protection Act, Maryland amended its equitable distribution statute so that military pensions are now considered marital property.[91] The Oklahoma Supreme Court recently announced a shift in direction concerning its treatment of pensions as marital property which could portend a different result when that court is next faced with a case concerning military retired pay. In *Carpenter v. Carpenter*,[92] the court held that a spouse's pension acquired during marriage is not necessarily that spouse's separate property. The court noted, however, that not all pensions are subject to division and pointed out instances where specific statutory exceptions control. The court used the example of railroad retirement benefits and cited *Hisquierdo v. Hisquierdo*,[93] wherein the Supreme Court found that Congress clearly intended those benefits to be the separate property of railroad retirees. If the Oklahoma Supreme Court follows that line of reasoning, its prior decision in *Baker v. Baker*[94] that military retired pay is not subject to division, is suspect in light of Congressional action in passing the Act. The same could hold true in Kentucky where the court relied on federal preemption in *Russell v. Russell*,[95] declaring that military retired pay is not subject to division.

Even in states where the military pension is considered as the separate property of the retiree and not subject to division as separate property, its overall impact on the marital estate is not ignored. Courts routinely consider it an economic circumstance to be taken into consideration when determining the overall needs or rights of the parties. For example, the court might award an ex-spouse a larger share of other marital property because the service member would be more financially secure due to the military pension. This point is illustrated by *In re Marriage of Dessauer*,[96] a Washington case involving a marital property settlement in a divorce action between an Army officer and his wife. As this was a post-*McCarty* but pre-Act case, the court was precluded from classifying Dessauer's military retired pay as community property and dividing it between the parties. However, the court reasoned that although the pension itself could not be divided, an equitable settlement could not be made without considering every economic asset of the parties, which included the pension.

On September 15, 1983, *Dessauer* became, in actuality, a case which is illustrative only. The Washington Supreme Court, freed from *McCarty* by the Act, overruled it in *In re Smith*.[97] The court noted that when *Dessauer* was decided, it was prohibited from characterizing military retired pay as community property because of *McCarty*. But as a result of the

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[86]Elliott v. Elliott, 274 N.W.2d 75, 77 (Minn. 1978).

[87]Jansen v. Jansen, 331 N.W.2d 752 (Minn. 1983).

[88]Woodward v. Woodward, 656 P.2d 431 (Utah 1982). *See also* Martinett v. Martinett, 331 P.2d 821 (Utah 1958).

[89]Brown v. Brown, 302 S.E.2d 860 (1983).

[90]47 Md. App. 460, 424 A.2d 783 (1981).

[91]*Supra* note 19.

[92]657 P.2d 646 (Okla. 1983).

[93]439 U.S. 472 (1979).

[94]546 P.2d 1325 (Okla. 1983).

[95]605 S.W.2d 33 (Ky. App. 1980). *cert. denied*, 453 U.S. 922 (1981).

[96]97 Wash. 2d 344, 650 P.2d 1099 (1982).

[97]*In re* Smith, 9 Fam. L. Rep. (BNA) 2705 (Oct. 4, 1983).

Act, it upheld a lower court's award of $500 a month to the former spouse as her separate property out of the retiree's $1,300 per month retired pay. She was additionally awarded $150 per month as child support for the couple's 15-year-old son.

California has also reiterated its position that in certain cases military disability retirement benefits will be treated as community property notwithstanding specific language in the Uniformed Services Former Spouses' Protection Act that disability payments are not considered retired pay.[98] The case involved a retired colonel who had the option of retiring with a disability pension of seventy-five of his base pay or retiring with a nondisability pension of sixty-five percent of his base pay. The colonel chose to retire with the seventy-five percent pension. In a subsequent divorce action, the trial court found that the ten percent excess of the disability pension represented additional compensation which could be attributed to his disability and the remainder should be considered as community property. The court reasoned that where a retiree has an option of retiring with either a disability or nondisability pension and chooses the disability pension, the effect is to transmute community property into separate property and impermissably negate the protective philosophy of California's community property law.[99] The underlying divorce action in which the court awarded the former spouse a portion of the disability pay had been final long before *McCarty*. When *McCarty* was decided, the retiree stopped payment relying on that decision. His ex-wife's subsequent action to compel continued payments was successful. On his appeal of that action, the retiree argued that although *McCarty* had been overruled by the Act, the Act specifically excluded disability pay. The court determined that Congress had not actually considered the issue of divisibility of disability pay where the retiree had the option of retiring with a disability or nondisability pension and ruled against the retiree.[100]

[98]10 U.S.C. § 1408(a)(4) (1976).

[99]*In re* Stenquist, 145 Cal. App. 3d 430, 193 Cal. Rptr. 587 1983).

[100]*Id.*

IV. Conclusion

As Congress has cleared away the impediment of *McCarty*, the focus now shifts back to state courts which must grapple with the complexities of the Uniformed Services Former Spouses' Protection Act. As courts begin to construe the Act in light of the property distribution schemes in their respective jurisdictions, it is clear that there will be continued judicial activity like that which has already occurred in New Jersey, Washington, California, Texas and South Carolina, or legislative activity like that in North Carolina, Maryland and Nevada. The trend to look for in states which have case law holding that military pensions cannot be awarded as separate property will be whether these states accept what can be considered a Congressional invitation to change the law. In states which have not previously addressed the issue of the divisibility of retired pay in divorce actions, the question will be whether the Uniformed Services Former Spouses' Protection Act generates a surge of litigation over that issue. In those jurisdictions where it was commonplace prior to *McCarty* to award a former spouse an interest in military retired pay, it will be interesting to observe how courts address the divisibility of nonvested military pension rights.

The Act remains controversial and even its underlying constitutionality remains in issue. There are at least three cases pending in federal courts attacking the Uniformed Services Former Spouses' Protection Act on constitutional grounds. In *Fern v. Turman*,[101] a retired officer challenged the Act. The district court dismissed his complaint but he appealed to the Ninth Circuit, which has consolidated his case with an Air Force case on the same issue. In *Anderson v. United States*,[102] recently decided in favor of the government, the plaintiff was a retired noncommissioned officer in Georgia whose ex-wife applied for a division of his retired pay based on a 1976 Texas divorce decree. He sued in federal court, arguing that the Act was unconstitutional. The court initially

[101]*Appeal filed*, No. 82-4577 (9th Cir. Oct. 1, 1982).

[102]No. C83-1294A (N.D. Ga., June 21, 1983).

enjoined the Army from processing the ex-wife's application for direct payment, but on September 28, 1983 dismissed the suit.

Assuming that the Act will be found to be constitutional, whatever approach courts take to the divisibility of military retired pay, they must tread cautiously. For the Uniformed Services Former Spouses' Protection Act is woven with intricacy and must be analyzed carefully to avoid injustice either to a former spouse or to a military retiree.

Denial of Delay: A Limitation on the Right to Civilian Counsel in the Military

CPT Gregory A. McClelland
OSJA, Ft. Clayton, Panama

I. The Problem

A service member's exercise of the right to representation by civilian counsel creates a situation with unique potential to delay court-martial proceedings. If all counsel at a court-martial are judge advocate officers stationed in the local venue, the trial judge can usually use his docket-control power to keep delay to a minimum. If the accused requests individually detailed military counsel from outside the jurisdiction, the Uniform Code of Military Justice provides a built-in delay-limiting mechanism: the request will be denied if the requested counsel is not reasonably available.[1] A civilian attorney is less subject to the military judge's control.

Delay involving civilian counsel can arise in several different ways. The accused may make a motion for a continuance to acquire or replace civilian counsel, or civilian counsel already retained may make the motion because he or she needs more time to prepare, is engaged in other courts, or is ill. When such a motion is made, the trial judge is faced with more than a routine problem of docket control; the decision could have constitutional repercussions because the sixth amendment right to counsel is involved. Assuming the accused's desire for civilian representation is bona fide and not merely dilatory, he or she clearly has the right to representation by an attorney in a court of law.[2] Further, unless that representation is professionally adequate, the right has little meaning. Does the accused also have a right to an attorney of choice? If forced to go to trial with an attorney not of his or her choosing and with whom the accused has a less than satisfactory attorney-client relationship, would this not impact on the right to effective representation? Should the accused be penalized if the attorney of choice has engagements in other courts which cause a request for delay in the military forum? What if, as a result of a denial of his motion, the accused is forced to trial with no attorney at all?

Against these considerations must be balanced the consequences of delay. Every court has the responsibility to wisely administer its docket. Delay can mean inconveniencing witnesses brought in from afar or losing their testimony altogether.[3] Other litigants may suffer by having their cases "bumped" by a continuously delayed case. The government's case could be weakened through delay when memories fade and evidence becomes stale. Justice may not be done because one goal of the judicial

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[1]Uniform Code of Military Justice article 38(b)(3)(B), (7), 10 U.S.C. § 838(b)(3)(B), (7)(1976) [hereinafter cited as U.C.M.J.].

[2]In the military, this right exists at general and special courts-martial and article 32 investigations. U.C.M.J. art. 38(b)(1).

[3]United States *ex rel* Carey v. Rundle, 409 F.2d 1210, 1214 (3d Cir. 1969), *cert. denied*, 397 U.S. 946 (1970) (that delays and postponements only increase the reluctance of witnesses to appear in court, especially in criminal matters, is a phenomenon which scarcely needs elucidation).

process—a full and fair hearing of the case—may be lost. Finally, society has an interest in having an end to litigation. A legal system which cannot resolve its cases with some degree of expedition loses credibility.

It is clear that an attorney who uses delay to intentionally impede court procedures or to gain an unfair advantage is acting unethically and can be sanctioned. Such tactics may also be detrimental to the client since they may alienate the judge or jury.[4] An attorney has the obligation not to take on more work than he or she can effectively handle, and engagement in another case, standing alone, is not adequate justification for a continuance.[5] The Code of Judicial Conduct and the American Bar Association Standards for Criminal Justice also place an obligation on the trial judge to ensure that the court's business is handled expeditiously and to grant continuances only for good cause[6] while still assuring that the defendant's case is not "railroaded." In most situations, defense requests for delay are not so devoid of justification as to rise to the level of unethical behavior or to unquestionably mandate denial. The trial court faced with a delay request, however, must always weigh the interest of expedition against that of fairness to the accused. Throughout this article, the guidelines set forth in the ABA Standards for Criminal Justice and the considerations discussed in the preceding paragraph will be referred to as judicial administration factors or considerations.

This article is an examination of cases where the issue of delay to allow the defendant to exercise the right to counsel has arisen. The patterns and principles disclosed in those cases can be employed to clarify, simplify, and standardize treatment of such situations in the future. The case law shows that these situations have been handled largely on a case-by-case basis in the past. Indeed, the Supreme Court has recognized that, since the decision to grant or deny a continuance motion is traditionally in the trial court's discretion, each case must be reviewed on its own merits, even when the motion is based on the fundamental right to counsel.[7] However, the cases do fall into general categories based on the particular variant of the right to counsel involved. Because each of these variants carries a different value, certain distinctions can be made in the treatment of right-to-counsel delay situations depending on how they are categorized. A trial judge, after categorizing a delay situation, can decide whether to grant or deny further delay based on the value of the right involved balanced against the weight of competing judicial administration considerations. Likewise, appellate courts could use the same criteria in analyzing the performance of trial judges and deciding which aspects of the case must be reviewed.

II. The Right: The Sixth Amendment

> In all criminal prosecutions, the accused shall enjoy the right...to have the assistance of counsel for his defense.[8]

The wording of this constitutional provision is, to say the least, economical. It does not specify whether the word "assistance" includes courtroom representation, and there is no inkling that the word "counsel" might include counsel of choice or effective counsel. Still, the provision greatly enlarged the original common law right. Before 1688, in England, the accused had no right to counsel if charged with a felony, except for the limited purpose of framing questions of law to present to the court. On the other hand, if charged with a misdemeanor, the accused could have the full assistance of counsel. After 1688, an English defendant could have the full assistance of counsel if charged with treason but not for any other felony. This

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[4]Standards for Criminal Justice standard 4-1.2 and commentary (1980); Model Code of Professional Responsibility Canon 6, EC 6-4 (1980).

[5]Standards for Criminal Justice standard 4-1.2(d), commentary at 4.14-4.15 standard 12-1.3, commentary at 12.12 (1980).

[6]Standards for Criminal Justice standards 6-1.4, 12-1.3; Model Code of Professional Responsibility Canon 3A(5) (1980).

[7]Ungar v. Sarafite, 376 U.S. 575, 589 (1963).

[8]U.S. Const. amend. VI.

was the English rule when our Constitution came into being.[9]

During the colonial period, most of the American colonies extended the right to counsel to criminal defendants only in felony cases.[10] The right was codified in the Bill of Rights as the sixth amendment. In a line of cases culminating in *Gideon v. Wainwright*,[11] the Supreme Court determined that the right to counsel was fundamental, and thus it was incorporated into the due process clause of the fourteenth amendment, making it binding on the states. This line of cases also explained and expanded the language of the sixth amendment and explored the reasons why the right to counsel is fundamental to our system.

The Supreme Court was first faced with the question whether the right to counsel was so fundamental as to be enforceable against the states in *Powell v. Alabama*.[12] In *Powell*, several out-of-state blacks were accused of raping white women on a train passing through Alabama. When the case was called to trial only a few days after arrest and arraignment, no one stood to answer "defense ready" for the defendants. After a discussion between the judge and several lawyers who were present, the judge appointed "all the members of the bar" to represent the defendants. The defense was perfunctory, and all defendants were convicted and sentenced to death. The Supreme Court found that, on these facts, the denial of the right to counsel was serious enough to require reversal. Since the Court limited its holding to the facts of the case before it, it did not decide whether the right should be enforced against the states in all cases, but, paradoxically, it called the right fundamental to our system and eloquently explained why after stating that the essential elements of due process are notice and hearing:

> What, then, does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would be, in many cases of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise. He lacks both the skill and knowledge adequately to prepare his defense, even though he [may] have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case, civil or criminal, state or federal court were arbitrarily to refuse to hear a party by counsel employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.[13]

In *Avery v. Alabama*,[14] the Supreme Court suggested a broadening of the right to counsel. The defendant was charged with murder, and at arraignment two defense lawyers were appointed. The trial was scheduled to begin two days later. When the case reached trial three days later, both defense counsel moved for a

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[9]Powell v. Alabama, 287 U.S. 45, 60-61 (1932).

[10]*Id.* at 60.

[11]372 U.S. 335 (1963).

[12]287 U.S. 45 (1932).

[13]*Id.* at 68-69.

[14]308 U.S. 444 (1940).

continuance, stating that they had not had sufficient time to prepare. Although the Supreme Court decided that the continuance had been properly denied by the state court and affirmed the conviction, it also recognized that failure to give defense counsel adequate time to prepare could amount to denial of the right to counsel. In agreeing to review the state court decision, the Court recognized that Avery had made a valid assertion of the constitutional right to counsel and also hinted that the right might include entitlement to *effective* assistance of counsel.

The Supreme Court firmly established the fundamental nature of the right to counsel in all felony cases, both state and federal, in *Gideon v. Wainwright*. Gideon had been charged with a non-capital felony in Florida. Too poor to hire his own attorney, he asked the state to provide him with one, but was refused because Florida law required appointment of defense attorneys for indigents only in capital cases. The Supreme Court decided that the right to counsel is so essential to our system that states must provide defense counsel to all felony defendants who cannot afford them. Justice Black provided a compelling argument for the importance of the right to counsel:

> That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries.[15]

III. Delay and the Right: The Civilian Context

Because the right to counsel is fundamental to our system, a motion for continuance which invokes it should be approached with caution by the adjudicator. As with other rights deemed fundamental to due process, however, there comes a point at which countervailing values prevail and the individual must be denied enjoyment of the right. Supreme Court and federal circuit cases in which the right to counsel issue has arisen in the context of continuance motions will be reviewed in an attempt to determine what values have been balanced against this right, where the balance has been struck in the various cases between the right and those values, and whether a pattern can be discerned in the handling of such cases.

In *Avery v. Alabma*, defense counsel made a continuance motion, alleging that three days preparation time for the defense of a murder case had been insufficient. The Supreme Court reasoned that since the Constitution does not specify a time interval that must be observed between appointment of counsel and trial, "the fact, standing alone, that a continuance has been denied, does not constitute a denial of the constitutional right to assistance of counsel."[16] Such a question, said the Court, is normally procedural and within the sound discretion of the trial judge, reviewable only if that discretion is abused. But the Court went on to recognize that simply supplying a defendant with counsel may not always be enough:

> [T]he denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given assistance of counsel.[17]

The Court thus found justification to review the trial judge's decision. Nevertheless, it concluded that the trial judge had not abused his discretion in denying the continuance because it felt that, in this particular case, defense counsel had the evidence and witnesses close at hand and could have prepared the case in the time allotted. The Court also noted the ample opportunity provided by the appellate process to litigate the issue and the fact that defense counsel had failed to indicate what more could have been done had additional preparation time been granted.

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[15] *Id.* at 344.

[16] *Id.* at 446.

[17] *Id.*

Another case in which the Supreme Court felt review of the trial judge's denial of a continuance motion was warranted was *Chandler v. Fretag.*[18] The defendant had been told at arraignment that he faced a maximum jail sentence of from three to ten years. Relying on this, he appeared in court pro se, intending to plead guilty. At the beginning of his trial, the judge told him that he could be tried as a habitual criminal under Tennessee law, and, if found guilty, the mandatory sentence was life imprisonment. Surprised by this information, the defendant requested time to retain a lawyer, but the judge, noting that the defendant had had since arraignment to seek representation, denied the request and ordered the trial to proceed. The defendant was convicted under the habitual criminal provision. The Supreme Court, reviewing the case on a writ of habeas corpus, reversed. Noting that the defendant had requested a delay to hire his own attorney, the Court stated that failure to allow any defendant the opportunity to be heard through retained counsel would violate due process, and that, as a corollary to that principle, due process requires that reasonable time be allowed a defendant to find and consult with a lawyer.[19] The refusal to allow the defendant time to obtain legal representation after he learned that he was in jeopardy of losing his freedom for life was a denial of due process.

In *Ungar v. Sarafite*[20], an attorney was cited with contempt of court as a result of his actions as a witness in a criminal trial and ordered to appear at a show cause hearing. At the hearing, Ungar was represented by two lawyers who asked for a one-week delay to prepare. When this was denied, both counsel withdrew, leaving Ungar without representation. Ungar then asked for a continuance to get an expert witness and was refused. The Supreme Court, reviewing the details of the requests for continuance, went one step further than they had in *Avery* by stating:

> [I]t is not every denial of a request for more time that violates due process *even if the party fails to offer evidence or is compelled to defend without counsel.*[21]

While recognizing that summary refusal to grant delay can "render the right...an empty formality," the Court stated that there are no mechanical guidelines for determining if further delay is justified, but that each case must be considered on its merits, with special attention given the information available to the trial judge at the time of denial.[22] In this case, the Court sustained the trial judge's action. The reasons given were that the evidence was readily available and the issues limited and clear-cut. The Court also noted that the motions were not made until the day of trial and that the defendant was a lawyer himself and should have been familiar with the court's procedures.

In *United States ex rel. Carey v. Rundle*,[23] the relator appeared at a preliminary hearing with counsel, but when the case was called to trial over two months later he was without counsel and so was unable to proceed. The court granted a month's continuance to allow the relator to secure private counsel, which he said he desired, but a voluntary defender was also appointed. When the case again came up for trial, the relator stated that he did not yet have private counsel and that he did not want to be represented by the voluntary defender. He requested another continuance to find private counsel. The motion was denied and the trial began. During a recess, a private attorney appeared and stated that he had been retained by the relator's mother to represent Carey but informed the court that he could not proceed with the trial until a later date since he was engaged in other courts. When the court refused to grant a delay longer than the

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[18]348 U.S. 3 (1954).

[19]*Id.* at 10.

[20]376 U.S. 575 (1963).

[21]*Id.* at 589 [emphasis added].

[22]*Id.*

[23]409 F.2d 1210 (3d Cir. 1969), *cert. denied*, 397 U.S. 946 (1970). *See also* United States v. Arlen, 252 F.2d 491 (2d Cir. 1958), where there was evidence that the defendant was trying to delay proceedings and the government's key witness was dying. The defendant's motion for a continuance was denied.

weekend, the attorney withdrew and the trial proceeded with the relator representing himself.[24]

The Third Circuit Court of Appeals identified the appellate issue as being a question of "whether the sixth and fourteenth amendments command an absolute right to a particular counsel for a particular trial at a particular time."[25] The court pointed out that case law had extended the right embodied in the sixth amendment beyond the mere possession of counsel to a requirement for a certain quality and effectiveness of counsel. However, the court also recognized that enforcement of this right must be balanced against considerations of judicial administration to protect both the prosecution and other litigants. The court concluded that the relator had been afforded due process by being given over a month to find counsel of choice. It was also noted that he had failed to give a good reason why he had been unable to find a lawyer in that time and that an attorney had been appointed to represent him, although he had rejected the services of appointed counsel. Given these circumstances, the appellate court found that the trial judge's discretion had not been abused nor had the relator's constitutional rights been violated by refusing to allow further delay.

In *Giacalone v. Lucas*,[26] the defendant retained Mr. Louisell as his attorney. Mr. Louisell made a practice of working closely with two associate attorneys on all cases, sharing all tasks with them, including interviewing witnesses and even arguing to the jury. As a result, all three lawyers were thoroughly familiar with this particular case. After two defense continuances, Mr. Louisell negotiated a trial date with the judge and prosecution by which time he expected to have completed some in-patient heart testing which he had scheduled. When the agreed upon date arrived, Mr. Louisell had not yet been released from the hospital, and the defendant asked for another continuance. The motion was denied.

On appeal, the Sixth Circuit Court of Appeals framed the issue as a review of the trial judge's exercise of discretion involving a balancing of "defendant's right to adequate representation of counsel" against the public interest in the prompt and efficient administration of justice.[27] The court listed five factors to be considered in balancing those values:

> [T]he length of the delay requested; whether the lead counsel has associates prepared to try the case in his absence; whether other continuances have been requested and received; the convenience or inconvenience to litigants, witnesses, opposing counsel, and the court; whether the delay seems to be for legitimate reasons, or whether it is purposeful and dilatory...[28]

In this case, the appeals court upheld the denial of continuance. In support of its decision the court noted that, although the defendant had clearly wanted Mr. Louisell as his lawyer, he had not objected to being represented by the associates and had not suffered prejudice as a result of Mr. Louisell's absence. The court also pointed out that defendant had not been able to give a definite time when Mr. Louisell would be available, that Mr. Louisell's medical treatment was elective, and that two continuances had already been granted.

In *Gandy v. Alabama*,[29] the defendant retained Mr. Coleman who appeared with him at arraignment. After two defense delays, Mr. Coleman appeared on the third scheduled trial date, announced that he had a commitment in another jurisdiction and would not be able to proceed with Gandy's case as scheduled and moved for another continuance. The trial court denied the motion and allowed Mr. Coleman to carry out his threat to withdraw. Gandy was

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[24]The voluntary defender was ordered to sit with the relator in court and advise him as required. 409 F.2d at 1216.

[25]*Id.* at 1211.

[26]445 F.2d 1238 (6th Cir. 1971), *cert. denied*, 405 U.S. 922 (1972).

[27]*Id.* at 1240.

[28]*Id.*

[29]569 F.2d 1318 (5th Cir. 1978).

forced to trial represented by Mr. Coleman's associate, who was not familiar with the case. The result was a conviction. The Fifth Circuit Court of Appeals began its review of the case by identifying four variations of the right to counsel: the right to have counsel, the right to a minimal quality of counsel, the right to a reasonable opportunity to select and be represented by chosen counsel, and the right to a preparation period sufficient to assure at least a minimal quality of counsel. The court further observed that these variations do not all carry the same weight and that the right to counsel of choice is not as compelling as the right to assistance of counsel.[30] Using a list of considerations similar to that employed by the Sixth Circuit in *Giacalone*, the court decided that the trial court in this case had abused its discretion and reversed the conviction. The court felt the most significant factors influencing the decision were that the associate who represented Gandy was unprepared and unfamiliar with the case, that the delay would not have placed an excessive burden on the court and the other parties, and that the trial court was aware of Mr. Coleman's abandonment in advance and did nothing about it. The court also stated that, since the violation asserted was denial of the right to counsel of choice rather than the right to effective representation, prejudice to the defendant as a result of the trial court's action was irrelevant. In dicta, the court stressed the importance of judicial administration and pointed out that an overly-liberal policy in allowing delays to some defendants could deprive others awaiting trial in the same jurisdiction of their right to speedy trial.[31]

In *Slappy v. Morris*,[32] the trial court appointed Mr. Goldfine of the San Francisco Public Defender's Office to represent the defendant. Shortly before trial, Mr. Goldfine was hospitalized and another attorney from the Public Defender's Office was appointed to replace him. Slappy complained that his new attorney had insufficient time to prepare; throughout the trial the attorney-client relationship progressively and publicly deteriorated. The trial court was aware of this deterioration and of Slappy's desire to have Mr. Goldfine as his counsel, but the trial proceeded and Slappy was convicted. On appeal, the Ninth Circuit was concerned with the importance of the attorney-client relationship in assuring effective representation, and quoted an Alaska case:

> The attorney-client relationship involves "an intimate process of consultation and planning which culminates in a state of trust and confidence between the client and his attorney." Often, the outcome of a criminal trial may hinge upon the extent to which the defendant is able to communicate to his attorney the most intimate and embarrassing details of his personal life. Complete candor in attorney-client consultations may disclose defenses or mitigating circumstances that defense counsel would not otherwise have uncovered...[33]

Citing *Releford v. United States*,[34] *Gandy v. Alabama*, and *United States v. Seale* in support, the court said," [T]he sixth amendment...encompasses the right to have the trial judge accord weight to the attorney-client relationship in determining whether to grant a continuance..."[35] Since the trial judge in *Slappy* had failed to inquire into the accused's good faith and the duration of Mr. Goldfine's hospitalization, the court found the failure to grant a continuance an abuse of discretion. The court also said that prejudice need not be shown because it considered this a case of the trial court's failure to provide counsel rather than one of the ineffective assistance of counsel.

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[30] *Id.* at 1323, *see also* cases cited therein.

[31] *Id.* at 1323 n.9.

[32] 649 F.2d 718 (9th Cir. 1981), *cert. granted*, 102 S. Ct. 3480 (1982).

[33] *Id.* at 720 (citing McKinnon v. State, 526 P.2d 18, 22 (Alaska 1974)). *See also* United States v. Seale, 461 F.2d 345, 358 (7th Cir. 1972) (if the Sixth Amendment right to effective assistance of counsel means anything, it certainly means that it is the actual choice of the defendant which deserves consideration.

[34] 288 F.2d 298 (9th Cir. 1961).

[35] 649 F.2d at 721.

IV. Delay and the Right to Civilian Counsel in the Military

> (1) The accused has the right to be represented in his defense before a general or special court-martial or at an investigation under section 832 of this title (Article 32) as provided in this sub-section.
>
> (2) The accused may be represented by civilian counsel if provided by him.[36]

United States v. Kinard[37] was tried in Vietnam in 1972. The accused received a continuance in May and another in June to give him more time to retain a lawyer in the United States and allow the lawyer to travel to Vietnam. In July the accused asked for a third continuance, stating that the lawyer was having trouble getting to Vietnam and that it was uncertain how long it would be before he would arrive. Since the article 32 investigation, Kinard had been offered assistance in obtaining civilian counsel, which he declined. He had also been given the names of several military counsel in Vietnam, from which he refused to make a selection. He was assigned seven military defense counsel, all of whom he rejected. The trial court denied the third motion for a continuance, and the accused went to trial represented by two military counsel with whom he refused to cooperate. Kinard was convicted.

On appeal, the Court of Military Appeals agreed with appellate defense counsel that "it ought to be an extremely unusual case when a man is forced to forego civilian counsel and go to trial with assigned military counsel rejected by him."[38] But the denial of the third continuance was upheld because it was not unreasonable in light of the case history and the trial judge's discretion to grant continuances, and also because the accused was found not to have been prejudiced. Although the Court of Military Appeals stated that it did not have to go so far as to find bad faith, i.e., whether accused was "attempting to vex the government with needless delay,"[39] the opinion left little doubt that appellant's actions were viewed that way:

> The appellant's precipitous and frequent discharge of appointed counsel, his refusal to accept assistance in obtaining civilian counsel, and his inability to relate some time limit for the continuance categorize the request (for a third continuance) as unreasonable.[40]

In *United States v. Griffiths*,[41] court-martial charges were preferred against accused, an Army major, in January of 1954. The accused retained Mr. McBride as civilian counsel and was represented by him at the article 32 investigation. In February, after referral of the charges to a general court-martial, Mr. McBride requested that the convening authority either try the case before 15 March, when McBride was scheduled to begin a trial in federal district court, or postpone the court-martial until the civilian case was completed. Since additional charges against Griffiths was being investigated, the case could not be tried before 15 March and all requests for an indefinite delay were denied by the convening authority. Nevertheless, continuances of specific duration were granted on 3 and 24 May 1954. During this time the accused was granted leave for the purpose of finding another civilian lawyer. On 7 June, the trial proceeded with the accused represented

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[36]U.C.M.J. art. 38(b)(1), (2).

[37]21 C.M.A. 300, 45 C.M.R. 74 (1972).

[38]*Id.* at 303, 45 C.M.R. at 77.

[39]*Id.* at 305, 45 C.M.R. at 79. *See also* United States v. Alicea-Baez, 7 M.J. 989 (A.C.M.R. 1979), where the accused decided he wanted a civilian defense counsel on the day of trial. The court stated that the trial judge could have concluded that the accused's actions were meant to vex the court, although there was no finding to this effect. *But see* United States v. Allison, C.M. 439297 (A.C.M.R. 30 June 1981) (unpub.), where the accused dismissed his first civilian counsel and hired a second the week before trial. The court found that the judge had abused his discretion in denying a delay to the second lawyer, who sent an associate to appear before the court and offered several alternate dates for the trial. The accused had requested no other delays.

[40]21 C.M.A. at 306, 45 C.M.R. at 80.

[41]18 C.M.R. 354 (A.B.R. 1954).

only by two detailed military counsel because he had been unable to find a civilian replacement for Mr. McBride.

Griffiths appealed his conviction and the Army Board of Review stated that engagement of an attorney in another court does not give the client-accused an absolute right to a continuance, and that rights of litigants in one court should not be determined by the docket of another.[42] The Board felt that the trial judge had not abused his discretion in denying the motion for a continuance to allow Mr. McBride to appear because the request was open-ended and Mr. McBride could have been found to be not "reasonably available."[43] The Board further stated that accused had not been prejudiced because his defense had been competently conducted.[44] It is also noteworthy that the defense was given plenty of time to prepare and Griffiths was given a chance to hire a civilian attorney to replace Mr. McBride.

Griffiths petitioned for review to the U.S. Court of Claims[45] on the ground that he had been denied his constitutional right to counsel of choice. The Court of Claims, like the Army Board of Review, noted that there was no evidence that Griffiths had received an incompetent or inadequate defense. As for the alleged deprivation of counsel of choice, the court said:

> [T]he Constitution obviously does not guarantee to an accused in a criminal prosecution the right to the assistance of any particular attorney. It is sufficient that the plaintiff was, as shown by the summary of the evidence given above, afforded a reasonable opportunity to attempt to arrange for the attendance of the attorney of his first choice at the court-martial trial.[46]

The petition for review was dismissed.

The trial judge's denial of a request for continuance was upheld by the Army Court of Military Review in *United States v. Brown.*[47] Brown was first officially notified of his right to civilian counsel on 21 March 1980, at the inception of the article 32 investigation. He initially named Captain Booth, an Army judge advocate, as his chosen counsel, but changed his mind during the investigation and stated he preferred a civilian lawyer, Mr. Katzen. The investigating officer refused to delay the proceedings to allow the accused to retain Mr. Katzen, and Brown renewed his request for delay before the trial judge at the first article 39(a)[48] session on 18 April. Unsuccessful efforts had already been made by Captain Booth to contact Mr. Katzen; the judge left the trial scheduled for 5 May, while scheduling another article 39(a) session for 24 April to review the progress made in the attempt to retain Mr. Katzen. On 24 April, the judge learned that Mr. Katzen had told Brown's military counsel that his decision to represent Brown was contingent on the outcome of his negotiations with Brown's mother, who would be paying his fee. The judge again left the trial tentatively scheduled for 5 May, gave detailed instructions on contacting Mr. Katzen, and offered any help the court could give. On 5 May, it was discovered that Mr. Katzen had declined to represent the accused. Brown requested a continuance to find another civilian lawyer, but the judge refused and ordered the case to trial.

The court held that the accused had not been improperly denied counsel of choice. The trial judge had inquired thoroughly into the circumstances and had not abused his discretion by denying the request for delay. The court cited

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[42] *Id.* at 359.

[43] *Id.* at 360. The Army Board of Review was, in this instance, quoting from another military case, United States v. Vanderpool, 4 C.M.A. 561, 16 C.M.R. 135 (1954), albeit approvingly. As pointed out in the first paragraph of this article, and as is clear from a glance at article 38, U.C.M.J. (especially in its latest form, Change 6, dated 1 Sept. 1982), the "reasonably available" test applies only with respect to the approval or denial of an accused's request for a *military* attorney of his choice. It has no application to his right to civilian representation.

[44] *Id.* at 360.

[45] Griffiths v. United States, 172 F. Supp. 691 (Ct. Cl.), *cert. denied*, 361 U.S. 865 (1959).

[46] *Id.* at 696.

[47] 10 M.J. 635 (A.C.M.R. 1980).

[48] U.C.M.J. art 39(a).

the length of time accused had been aware of his right to civilian counsel, the fact that the government had two inconvenienced and reluctant civilian witnesses who might not be available for future trial dates, the lack of effort on the part of Brown himself to solve fee problems with Mr. Katzen coupled with the lack of prospects for any other specific civilian counsel, the competence of military defense counsel as personally known by the judge, and the accused's lack of credibility as assessed by the trial judge as important factors in its decision.[49]

In *United States v. Johnson*,[50] the accused was charged with rape. He was represented by military counsel at the article 32 investigation and stated at the first article 39(a) session on 11 August 1980 that he was satisfied to continue with military counsel alone. At that time, he had written to a civilian attorney, Mr. Smith, but had not received a reply. On 14 August, when the trial was scheduled to begin, Mr. Smith appeared, was retained by the accused and requested a continuance to prepare. This was granted and the new date set for trial was 2 September, a date in which Mr. Smith and all other parties concurred. At an article 39(a) session held on 28 August, Mr. Smith asked for another continuance, stating that he wanted to subpoena two witnesses from outside the jurisdiction and that he was having problems gaining access to his client who was in pre-trial confinement. The judge denied the request, ordering the government to insure Mr. Smith's access to the accused and to assist him in getting his witnesses. This was done. However, on 2 September, Mr. Smith renewed his motion for a continuance, stating that he had learned of two more potential witnesses in Germany. The motion was denied, the trial proceeded, and Johnson was convicted.

The appeal was framed in terms of denial of effective assistance of counsel rather than denial of counsel of choice. The Army Court of Military Review found that the accused had not sustained his burden to justify the motion for a continuance, and that the judge had not abused his discretion in denying it. The government had eliminated the problems articulated by Mr. Smith in his first request for a continuance. As for the two witnesses from Germany, there had been no showing of materiality. This was weighed against the facts that there had been one two-week delay granted which had been agreeable to all, the government had brought in a number of witnesses, including a civilian rape victim and a witness from Germany and had kept one witness from leaving active duty pending trial. Finally, the court found there had been no prejudice to the accused because both his military counsel had thorough knowledge of the case, were well-prepared and had conducted a vigorous defense.

V. Toward a Method of Analysis

In theory, as already pointed out in *Avery v. Alabama*, an appellate court's standard approach to determining whether a trial court's denial of a motion for continuance infringes upon the appellant's right to counsel is to consider the matter one of judicial administration subject to the discretion of the trial judge, and thus, reviewable only in the event of an abuse of that discretion.[51] Case law reveals that, in practice, the appellate court will weigh the equities in favor of the appellant's assertion of the right to counsel against the type of judicial administration factors enumerated in *Giacalone v. Lucas* on a case-by-case basis. In effect, the appellate court reenacts what the trial judge presumably did in considering and ruling on the motion; it fully reviews the trial judge's

[49] 10 M.J. at 638.

[50] 12 M.J. 670 (A.C.M.R. 1981), *petition denied*, 13 M.J. 112 (1982). *See* Hicks v. Wainwright, 633 F.2d 1146 (5th Cir. 1981), a similar case where it was determined that the trial court had abused its discretion and deprived defendant of effective assistance of counsel by refusing to grant him a delay to assure the presence at trial of an expert witness. The witness' expected testimony was relevant to an essential issue in the case.

[51] 308 U.S. at 446. This procedure is not applicable in the case of denial of a continuance to allow the military accused to exercise his right to civilian counsel at an article 32 investigation. There, respondent is entitled to appellate relief if he makes timely objection to the denial of a substantial right. United States v. Chuculate, 5 M.J. 143 (C.M.A. 1978). The right to civilian counsel is a substantial one, and its denial will require a new investigation if objection is timely made. United States v. Lewis, 8 M.J. 838 (A.C.M.R. 1980).

actions to determine if there was an abuse of discretion. What is an abuse of discretion?

> Discretion... is abused when the judicial action is arbitrary, fanciful or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.[52]

Stated another way, if, on review, the appellate court feels that the right outweighs the judicial administration factors, the trial court is overruled; if the right is outweighed, the opposite result is reached. In many instances, the issue is completely relitigated on appeal. If the judicial fiction of nonreviewability was eliminated and cases of this type categorized, the process might be streamlined and the results made more consistent.

A good starting point in categorizing right-to-counsel delay situations is *Gandy v. Alabama*, where the appellate court identified four variations on the right to counsel. The court also noted that these variations are not all accorded equal weight by the Constitution, as interpreted by the Supreme Court and lesser tribunals. For instance, as the Third Circuit Court of Appeals stated in discussing the right to counsel of choice; "[A]lthough the right to counsel is absolute, there is no absolute right to a particular counsel."[53] Simplifying the *Gandy* scheme, the cases reviewed fall into three categories, roughly corresponding to the basic right to counsel and its two main variants: the right to counsel, the right to adequate representation, and the right to counsel of choice. Since the right asserted carries a different value in each category, a sliding scale can be used in weighing it against considerations of judicial administration, and a standard method could be employed to handle each type of case.

Counsel of Choice

There are cases in which the defendant is denied a continuance of sufficient time to allow representation by the preferred lawyer, but in which there is no prejudice beyond the mere denial of attorney of choice. In these cases, the defense is constitutionally adequate, either because the defendant has an alternate attorney available with whom there is a workable attorney-client relationship, who is prepared, and who conducts a professionally competent defense, or because the defendant competently and voluntarily defends her or himself.

Most of the military cases discussed fall into the "choice" category, since the Uniform Code of Military Justice requires appointment of military counsel in all cases, and provides that such counsel will act in an associate capacity to civilian counsel unless specifically rejected by the accused.[54] Thus, there is usually a competent, prepared lawyer available with whom the accused has a pre-existing attorney-client relationship and who can conduct the defense in the absence of civilian counsel.

The *Gandy* court found the right to counsel of choice, standing alone, to be the least compelling of the three variants of the right to counsel, and commented that it should not be used as a "manipulative monkey wrench"[55] to sabotage the judicial system. If it is accepted that the primary justification for the right to counsel in our system is that articulated by the Supreme Court in *Powell v. Alabama, i.e.*, the helplessness of the layman vis-a-vis the technicality of the judicial apparatus, then the denial of counsel of choice, if it affects neither the fact nor the effectiveness of representation, is a relatively minor constitutional deprivation. Consequently, this right should carry less weight than the other right to counsel variants when balanced against considerations of judicial administration. In

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[52]Delano v. Market St. Ry. Co., 124 F.2d 965, 967 (9th Cir. 1942).

[53]United States *ex rel.* Carey v. Rundle, 409 F.2d at. It is debatable whether even the basic right to counsel itself is absolute. *See* Ungar v. Sarafite, 376 U.S. 575 (1963).

[54]U.C.M.J. art 38(b)(4).

[55]569 F.2d at 1323.

United States ex rel. Carey v. Rundle, the Third Circuit Court of Appeals said:

> Due Process demands that the defendant be afforded a fair opportunity to obtain assistance of counsel of his choice to prepare and conduct his defense. The constitutional mandate is satisfied so long as the accused is afforded a fair and reasonable opportunity to obtain particular counsel, and so long as there is no arbitrary action prohibiting the effective use of such counsel.[56]

The Supreme Court, in *Chandler v. Fretag*, has also stated that a defendant should have a *reasonable* time to find and consult with a lawyer.[57]

When deciding whether to grant an accused further delay to obtain a civilian lawyer, the trial judge should inquire whether the accused has already had reasonable time to do so after being initially advised of the right to civilian representation. If so, the judge should determine if an alternate attorney is immediately available to the accused, who is competent and prepared, and who has a workable attorney-client relationship with the accused. The judge should also inquire whether other conditions exist which could cause prejudice to the accused due to the absence of the chosen lawyer, such as the presence of specialized issues which only the chosen counsel could handle. If the accused had a reasonable opportunity to secure counsel of choice and will suffer no prejudice beyond deprivation of the services of a particular attorney, neither the Constitution nor case law require further delay, and the ABA Standards for Criminal Justice discourage it.[58] The trial judge may balance the accused's need for an attorney of choice against considerations of judicial administration to determine if the time already allotted to find a lawyer was, in fact, reasonable. Even this is arguably unnecessary if that period of time would normally be adequate for such a purpose under the circumstances. If the balancing process is used, any considerations of judicial administration should weigh heavily against further delay. The appellate court need not inquire into the performance of the attorney who represented accused at trial, *i.e.*, into prejudice, but need only ask if the initial period granted to the accused was clearly unreasonable. If it was not, then the trial judge's action on the motion for continuance should stand. This result should be reached even if the accused's chosen counsel is absent due to factors beyond the accused's control, such as the attorney's engagement in other courts.[59]

Adequate Representation

When the denial of counsel of choice results in denial of effective representation for the defendant, the infringement of the right to counsel is more severe and the case for defense delay accordingly stronger. A denial of a delay to secure counsel of choice may put the case in this category if the accused is represented at trial by counsel not of his choosing and if such representation is found to be constitutionally inadequate. The inadequacy may result from incompetence of available counsel, or a bona fide inability of the accused to form a functional attorney-client relationship with available counsel, such as occurred in *Slappy v. Morris*. Inadequate representation may also result from the trial court's unjustified refusal to give defendant's counsel of choice time to prepare.

As the results in *United States v. Seale* and *Slappy v. Morris* indicate, in cases where there is evidence that alternate defense counsel may not be acceptable to the accused, the trial court should closely scrutinize the accused's relationship with such counsel before denying a motion for continuance to allow counsel of choice to appear. Of course, such scrutiny may reveal a bad faith intent on the part of the accused to impede the judicial process, such as occurred in the military cases of *United States v. Kinard* and *United States v. Alicea-Baez*.[60] In such a

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[56]409 F.2d at 1215.

[57]348 U.S. at 10.

[58]Standards for Criminal Justice standard 12-1.3, commentary at 12.12 (1980).

[59]*See* United States v. Poulack, 556 F.2d 83 (1977), and cases cited therein.

[60]7 M.J. 989 (A.C.M.R. 1979).

case, if the alleged lack of an acceptable attorney-client relationship is the only source of prejudice, the trial court might be justified in denying any further delay.[61] Inquiry should also be made into the possibility that the case might involve specialized issues which are beyond available counsel's expertise, and into any allegations by defense counsel of inadequate preparation time. Trial courts should not be quick to deny continuances in the latter case because forcing an accused to go to trial with unwanted or unprepared counsel may result in "nothing more than a formal compliance with the Constitution's requirement"[62] and "render the right to defend with counsel an empty formality."[63] Initially, at least, considerations of judicial administration should weigh less heavily here than in a mere "choice" case.

On appeal, the existence of prejudice to the accused as a result of the absence of chosen counsel at trial is of primary concern. If prejudice is found, the appellate court must review the trial judge's balancing of the right to counsel of choice against considerations of judicial administration. The appellate court's job will be made much easier if the trial judge makes detailed, specific findings regarding such issues as accused's attorney-client relationship with the lawyer who actually defends him or her and the considerations which motivated the judge to decide to proceed in the absence of accused's chosen defender.

Right to Counsel

The last and most extreme case is that where the denial of further delay forces the accused to go to trial without counsel. Since this constitutes a deprivation of the basic right granted in the Constitution, defense requests for delay in such circumstances are on the strongest ground. Yet such a deprivation is not inconceivable, even in the literature of the Supreme Court. It will be recalled that in *Ungar v. Sarafite*, the Court unequivocally stated that not all denials of requests for continuance violate due process, even when an accused is compelled to defend without counsel as a result. Ungar himself was forced into a pro se defense, and although the facts were unusual in that he was a lawyer, the Court did not limit its holding to the case before it. A more classic case in this genre was *United States v. Arlen*[64] where the denial of further delay which forced defendant to proceed pro se was upheld by the Second Circuit Court of Appeals. The presence there of the opposing concern of a dying government witness merely emphasizes the fact that the basic right to counsel is not absolute, but must also eventually bow to other interests. In the military context, *United States v. Allison*[65] was a case in which a denial of delay leading to a pro se defense was found to be an abuse of the trial court's discretion.

The courts' attitudes should be most liberal regarding motions for continuance in cases in this category. Trial courts should make every effort to assure that the accused either has an attorney, through court appointment or granting further delay to retain one, or makes a knowledgeable and conscious choice for a pro se defense. Judicial administration factors should weigh least heavily in this category, although as *Arlen* illustrated, their presence must eventually dictate an end to delay.

IV. Conclusion

In summary, cases in which the issue of delay granted to allow the accused to pursue his constitutional right to counsel has arisen can be broken down into three categories, corresponding to the basic right and its two variants: the

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[61] *See* United States *ex rel.* Spurlark v. Wolff, 683 F.2d 216 (7th Cir. 1982), where defendant was forced to trial with an unwanted defense attorney after over twenty defense continuance motions had been granted, most of them because of the failure of defense counsel to appear. *See also* Standards for Criminal Justice commentary to standard 12-1.3 (1980).

[62] Avery v. Alabama, 308 U.S. at 446.

[63] Ungar v. Sarafite, 376 U.S. at 589.

[64] 252 F.2d 491 (2d cir. 1958).

[65] *But see* United States v. Leavitt, 608 F.2d 1290 (1979), where defendant had to proceed through the government's presentation of its case without counsel. There, denial of a continuance motion was upheld because defendant had known of the need for counsel for four months, he had already been given one continuance to secure counsel, the prosecution had to muster its witnesses twice, and the case was not particularly complex.

right to counsel, the right to effective representation, and the right to counsel of choice. The courts have accorded each of these rights a different weight in balancing them against considerations of judicial administration; the right to counsel of choice being considered the least compelling and the basic right to counsel being given the most importance. Litigating motions for continuance made for right to counsel reasons could be simplified, and the results made more uniform, if trial and appellate courts would categorize the case and base their actions on the type of right being asserted.[66] In the military context, this approach could also be employed to avoid the unreasonable delays which often occur when the accused exercise his or her right to civilian representation.

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[66]Of course, a case could change character over time. For instance, a case which was in the "choice" category at the time of the initial motion for continuance might later evolve into a "choice-plus-prejudice" case due to a good faith breakdown in the attorney-client relationship. Thus, the trial court should thoroughly scrutinize the facts at the time of each delay motion before categorizing the case.

The Military Police Corps: Combat Soldier and Investigator

Major John R. Beeson
Senior Legal Instructor,
U.S. Army Military Policy School, Fort McClellan

Problem

A recent trend in military policy (MP) training has shown that the MP is a combat fighting member. How trained are these personnel in the law? What law are they taught? What can the local staff judge advocate (SJA) office do to provide additional unit legal training? These are the questions which will be answered by this article.

Background

In the autumn of 1980, Fort McClellan began new courses of instruction to enhance the combat effectiveness of the Military Police Corps. This increase in combat preparedness required the reallocation of time into combat instruction. Today the garrison law enforcement/investigator instruction is increasing dramatically to meet the ever changing requirements of MP personnel. The number of instructors in the Department of Command and Tactics was significantly increased. Acronyms such as FEBA, FLOT, RAP, RACO and HMMWV became increasingly commonplace terms. The best utilization of instruction time was continually discussed and remains a key issue today.

It must be emphasized that at no time has the U.S. Army Military Police School (USAMPS) considered its "police" role as secondary. The peacetime law enforcement role is still looked upon extremely important, and emphasis is correctly placed on this critical mission. The Military Police Corps is well aware of its motto, "Of the Troops and for the Troops". This exemplifies the Corps' law enforcement/protective peacetime mission.

Law Instruction

The actual legal instruction which is accomplished by the four attorneys assigned to the USAMPS has been affected very little. The School did not reduce the hours of legal instruction. The legal instruction presently given at USAMPS is listed below. These hours and tasks are designed to provide job skills which must be possessed by each MP.

Course	Subject		Hours
1. Military Police Officer Advanced (MPOA)	Military Justice		9
	Search & Seizure		8
	Authority & Jurisdiction		3
	Confessions & Admissions		2
	Status of Forces Agreements		2
	Law of War		3
	Examination		3
		Total	30
2. Military Police Officer Basic (MPOB)	Military Justice		7
	Code of Conduct		1
	Introduction to Criminal Law		5
	Confessions & Admissions		3
	Search & Seizure		4
	Law of War		2
	Evidence		1
	Standards of Conduct		1
	Examination		3
		Total	27
3. Criminal Investigator Basic (CID)	Military Justice		4
	Authority & Jurisdiction		4
	Crimes I		4
	Crimes II		4
	Search & Seizure		7
	WIMEA		2
	Confessions & Admissions		5
	Economic Crimes		4
	Mock Court		4
	Examination		3
		Total	41
4. Criminal Investigator Warrant Officer Advanced (CIWOA)	Law Update	Total	6
5. Advanced Investigator Management (AIM)	Law Update	Total	2
6. Advanced Investigator Management (Reserve Components) (AIM-RC)	Law Update	Total	2

Course	Subject		Hours
7. Military Police Investigator (MPI)	Military Justice		4
	Authority & Jurisdiction		4
	Crimes I		4
	Crimes II		4
	Search & Seizure		6
	Confessions & Admissions		4
	Examination		3
		Total	29
8. Military Police Investigator (Reserve Components)	Law Update		3
	Examination		1
		Total	4
9. Noncommissioned Officer Advanced (MPNCOA)	Military Justice		2
	Search & Seizure		2
	Law of War		2
	Examination		2
		Total	8
10. Basic Technical Course (BTC)	Basic Law		8
	Examination		2
		Total	10

The following courses are also taught by the Law Division at USAMPS. The increase in combat operations instruction has not affected these courses.

Course	Subject		Hours
1. Criminal Investigator (Reserve Component) (CID-RC)	Law Update	Total	3
2. Counterterrorism	Legal Aspects		2
	Command Post Exercise		3
		Total	5
3. Physical Security	Legal Aspects	Total	4
4. Corrections (Army)	Legal Aspects		3
	Examination		2
		Total	5
5. Corrections (Navy)	Legal Aspects	Total	3
6. Navy Master-at-Arms (NMA)	(Like Army MPI)	Total	36
7. Polygraph Examiner Training (PET)	Legal Aspects	Total	5
8. Polygraph Examiner Advanced (PEA)	Legal Aspects	Total	3

Course	Subject		Hours
9. Precommand Course (PCC)	Varies as to the desires and positions of the student		Varies
10. Chemical Officer Advanced (COAC)	Basic Law		15
	Examination		3
		Total	18
11. Chemical Officer Basic (COBC)	Basic MQS II		15
	Examination		3
		Total	18
12. Noncommissioned Officers Advanced (CNCOAC)	Basic Law	Total	10

Additional Instruction

It is impossible to teach every task that a military member is possibly going to perform in his or her next assignment. TRADOC schools identify those tasks which are most likely to be needed and teach each of those tasks within a set amount of time. Those tasks which cannot be covered by instruction in the specified course are identified for unit training. Instructors from staff judge advocate offices can provide invaluable unit training sessions to MP and CID units. The following subjects are not instructed by attorneys in courses at USAMPS and would greatly benefit MP and CID units:

Local traffic statutes.
Use of force.
Use of informants—in depth.
Army policy on homosexuality.
Investigation of fraudulent claims.
Child or spouse abuse and related crimes against children.
Crimes (Captains and above do not receive this training).

One Station Unit Training (OSUT)

The initial entry soldier desiring to become an MP must successfully complete Phase II (comparable to AIT) of the 95B OSUT program in order to be awarded MOS 95B. Although this training is normally presented to trainees in the grades E-1 through E-3, soldiers in the grades E-4 through E-6 may also be trained during Phase II. These students receive 310 hours of training, 205 hours of which are devoted to law enforcement related tasks. Of these 205 hours, twelve hours are devoted to instruction in the law, including the following tasks:

Determine the requirements for a lawful apprehension.
Determine Authority for search and seizure.
Advise suspect of Article 31, UCMJ—Miranda rights.
Decide when to use force.

This training is presented by senior Military Police NCOs assigned to the Department of Basic Military Police Training (DBMPT), who must first be certified by the Chief or Assistant Chief of the Law Division as fully qualified to teach the classes. Additionally, all lesson plans used in the instruction are reviewed and concurred in by the Law Division. Meetings between the DBMPT and Law Division instructors occur at least once a month in order to keep the DBMPT instructors abreast of the latest pertinent developments in the law and to allow them to present any problems, comments or suggestions to the Law Division instructors. This cooperative interaction has resulted in the highest quality of instruction possible to the potential MP.

Recently, the Commandant of the USAMPS approved an additional twenty-four hours of law enforcement tasks to be taught in Phase II:

Gather, record and report police information.
Conduct interviews.
Enforce traffic regulations.
Process drunk drivers.
Identify evidence and contraband.
Collect and process evidence.

This additional instruction will not decrease the Combat/Combat Support training at all; in fact, it results in a net increase of three additional training days during Phase II.

Below are some suggested topics that local military attorneys can present to junior enlisted MPs to assist the local MP commander or provost marshal in the unit training program:

Use of deadly force.
Determine the requirement for a lawful apprehension.
Use of the DA Form 3881.
Rights advisement under Article 31, UCMJ.
Testify in court.
DUI regulations.
Give implied consent warning.
Identify and report suspected cases of child abuse/neglect.

Conclusion

An External Evaluation Questionnaire (LAW) will soon be received by MP and CID units and staff judge advocate offices. Answers and comments on these questionnaires will provide the Law Division and the Department of Military Police Operations and Investigations, USAMPS, with the necessary feedback to show where the training system may be weak. This is an example of the positive attitude toward the "police" mission of the USAMPS. While the USAMPS and Military Police Corps emphasize the combat role in the U.S. Army, they are equally dedicated to the corps' peacetime mission, the prevention and investigation of criminal activity in the U.S. Army.

This article provides general information on legal instruction given at the USAMPS. SJAs are encouraged to meet with their MP operations officer or MP company commander to determine the substantive contents required by that particular unit in the legal topics suggested for local unit training in this artcle. That individual will have job books and soldier manuals describing the contents of the courses taught at USAMPS. SJAs desiring additional information should contact the Law Department, U.S. Army Military Police School, Fort McClellan, AL 36205.

HQDA Message—Military Justice Act of 1983

P 081630Z DEC 83
FM HQDA WASHDC //DAJA-CL//
DAJA-CL 1983-6362
FOR SJA: Pass to subordinate court-martial jurisdictions.
SUBJECT: Enactment of Military Justice Act of 1983

1. On 6 Dec 83, the President signed the Military Justice Act of 1983, Public Law No. 98-209, 97 Stat. 1393. The effective date of most parts of the Act is 1 Aug 84. Those parts effective immediately are provisions affecting the jurisdiction of the DRB and BCMR's and the membership of the Code Committee, and establishing a commission to study certain aspects of military justice, including judge alone sentencing and increasing the sentencing power of SPCM's.

2. The MCM revision will include provisions to implement the legislation. The new MCM will be effective on 1 Aug 84. A team has been formed to give on-site instruction on the legislation and new MCM at selected installations in CONUS and overseas. Most JA's should be able to attend one of these sessions. More information on the instruction will be provided by letter and in *The Army Lawyer.*

3. Highlights of the legislation include the following:

a. Amends articles 25, 26, 27, and 29 to modify rules governing detailing and excusal of court-martial personnel.

(1) Permit limited delegation of convening authority's powers to excuse members before assembly.

(2) Delete requirement that convening authority personally select and detail military judges and counsel.

(3) Allow military judge to excuse members for good cause after assembly.

b. Amends articles 34, 60, 61, 63 and 64. Convening authority is not required to examine case for legal sufficiency before or after trial.

(1) No referral unless SJA finds case sufficient—short pretrial advices.

(2) Posttrial—CA may disapprove findings and sentence as a matter of command prerogative—no legal review required.

(a) No posttrial review—SJA prepares brief recommendation in GCM's, and SPCM's where BCD adjudged.

(b) DC has opportunity to submit matters.

c. Amends articles 62, 66, 67, and 69. Appellate matters.

(1) Government may appeal to CMR certain adverse rulings of trial judge.

(2) Accused may waive CMR review in all except capital cases.

(3) Cases actually reviewed by the CMA are subject to Supreme Court review on writ of certiorari.

(4) TJAG's article 69 powers expanded (includes review of sentence appropriateness).

d. Establishes a nine-member commission to study:

(1) Sentencing by military judge alone; suspension power for MJ; tenure for MJ.

(2) Increase SPCM jurisdiction to include CHL X 1 year.

(3) Retirement program for CMA judges.

e. Other provisions.

(1) Creates new punitive article (112A) on drug offenses (consistent with recent MCM change).

(2) Expressly restricts authority of BCMR's and DRB to review courts-martial.

(3) Adds two members of public to Code Committee.

Letter, DAJA-CL 1983/6307, 13 Dec 1983, subject: Instruction on the Military Justice Act of 1983 and the Manual for Court-Martial

DAJA-CL 1983/6307 13 DEC 1983

SUBJECT: Instruction on the Military Justice Act of 1983 and the Manual for Courts-Martial

STAFF JUDGE ADVOCATES

1. The Military Justice Act of 1983 and the new Manual for Courts-Martial will become effective on 1 August 1984. The new Manual will include changes implementing the legislation.

2. Because of the many important changes in the Code and the Manual, all judge advocates and others involved in the military justice system should prepare for these changes in advance of their effective date. To assist in this, a team of three instructors from the Working Group which worked on the legislation and which drafted the Manual will present a one-day lecture on the codal changes and the new Manual at selected installations. Sites have been selected to try to accommodate as many people as possible from all of the services. A list of the installations and the dates of the instruction is attached. Also attached is a preliminary course schedule.

3. The Judge Advocate General has directed that all members of the Corps attend this instruction if possible. Persons at installations which will not be visited should plan to attend the training at another installation. No DA funds are available for this purpose. Further, funding constraints limit the number of places which can be visited by the training team. SJA's at host installations should make every effort to enable persons from elsewhere—including members of other services and reservists—to attend. Priority must be given to active duty judge advocate officers in view of the limited training time available before field implementation of the legislation and the new Manual. It is stressed that this instruction is designed only to familiarize judge advocates with the new substantive and procedural changes in the Code and Manual. Further self study programs are essential in order to adequately prepare for the August implementation date.

4. Staff judge advocates at the Army installations which will host the instruction have designated an officer as coordinator. This officer will arrange for a suitable site for the instruction and serve as point of contact for the instructors and for persons from other installations and reservists who attend at that installation. The coordinators are listed on the attached schedule. SJA's at installations which will not be visited should contact the coordinator at the most convenient installation and make necessary arrangements. This contact should be initiated as early as possible to permit appropriate arrangements. Members of the Army will be welcome at Navy or Marine installations and can make arrangements with them when necessary.

5. Legal clerks, commanders, and others who may be interested are welcome to attend the instruction, space permitting. The instruction is designed for attorneys. The instruction will include information to assist JAs to instruct local commanders, reserve judge advocates, legal clerks, and others on the new Manual. In addition, TJAGSA is preparing materials to assist JAs to instruct others on the new Manual. If legal clerks cannot attend the entire session, they may wish to attend the last hour in the morning and the last two in the afternoon, at which sessions subjects of special importance to them will be addressed. See the attached course schedule.

DAJA-CL 1983/6307
SUBJECT: Instruction on the Military Justice Act of 1983 and the Manual for Courts-Martial

6. For those SJAs at host installations who request it, the Army instructor, Major Cooke, will give a 45 minute briefing on the new provisions to commanders and other officers. This instruction will be given at 0945. A suitable place close to site of the instruction will be required.

7. A videotape of the instruction will be prepared for distribution for those unable to attend the on-site instruction. Videotape is at best a necessary substitute, however, and on-site instruction should be used to the fullest extent possible.

8. If you have questions concerning the instruction or the revision, please contact Major John Cooke at Autovon 225-1891.

Enclosure

Signed
KENNETH A. RABY
Colonel, JAGC
Chief, Criminal Law Division

ON SITE INSTRUCTION — MCM, 1984

DATE	SITE	CONTACT
Tues, 31 Jan 84	Fort McClellan, AL	Captain Shelby Tanner AV: 865-5435 C: (205) 238-5435
Thurs, 2 Feb 84	Fort Gordon, GA	Major Michael Wamstead AV: 780-4361 C: (404) 791-4361
Wed, 10 Feb 84	Naples, Italy	Lieutenant Gordon Ivins AV: 625-1100 Ext 4482
Fri, 10 Feb 84	Frankfurt, F.R.G.	Captain Jerry Peace Heidelberg Military 7532
Mon, 13 Feb 84	Heidelberg, F.R.G.	"
Wed, 15 Feb 84	Nuernberg, F.R.G.	"
Wed, 22 Feb 84	Fort Bragg, NC	Lieutenant Colonel David McNeill AV: 236-5506 C: (919) 396-5506
Thurs, 23 Feb 84	Camp Lejeune, NC	W01 Mike Hagerty AV: 484-5177 C: (919) 451-5177
Thurs, 1 Mar 84	Seoul, Korea	
Sat, 3 Mar 84	Yokosuka, Japan	Lieutenant Stephen Coyle AV: 234-7630
Tues, 6 Mar 84	Okinawa	
Thur, 8 Mar 84	Subic Bay, Philippines	
Sat, 10 Mar 84	Guam	
Mon, 12 Mar 84	Pearl Harbor, Hawaii	Lieutenant Steven Owens AV: 430-0111 Ask for Com 471-0291
Tues, 20 Mar 84	Parris Island, SC	Captain Brian Turcott AV: 832-2557 C: (803) 525-2557
Thurs, 22 Mar 84	Jacksonville Naval Air Sta., FL	W04 David Beniash AV: 942-2571 C: (904) 772-2571
Tues, 27 Mar 84	Fort Belvoir, VA	Major Tony Byler AV: 354-5093 C: (703) 664-5093

DATE	SITE	CONTACT
Tues, 3 Apr 84	Pensacola Naval Sta., FL	Lieutenant Eric Bredemeyer AV: 922-3720 C: (904) 452-3730
Thurs, 5 Apr 84	Fort Benning, GA	Captain William Allinder AV: 835-3185 C: (404) 545-3185
Tues, 10 Apr 84	Fort Sill, OK	Major Michael DeBusk AV: 639-3900 C: (405) 351-3900
Thurs, 12 Apr 84	Fort Hood, TX	Major John Tyrrell AV: 737-7301 C: (817) 287-7301
Fri, 13 Apr 84	Fort Sam Houston, TX	Captain David Cooper AV: 471-6288 C: (512) 221-6288
Tues, 24 Apr 84	Naval Base, Philadelphia, PA	Commander, John Dombroski AV: 443-6593
Thurs, 26 Apr 84	Naval Justice School, Newport, RI	Lieutenant Commander John Radd AV: 948-3809
Tues, 1 May 84	Fort Leonard Wood, MO	Major James Norton AV: 581-8176 C: (314) 368-8176
Thurs, 3 May 84	Fort Leavenworth, KS	Captain Gordon Carlson AV: 552-4844 C: (913) 684-4844
Fri, 4 May 84	Great Lakes Naval Base, IL	Lieutenant Brian McMenamin AV: 792-4753 C: (312) 688-4753
Tues, 8 May 84	TJAGSA	
Tues, 15 May 84	Fort Carson, CO	Captain Eules Mills AV: 691-4766 C: (303) 579-4766
Thurs, 16 May 84	Fort Bliss, TX	MSG Gerald Barnes AV: 978-5102 C: (915) 568-5102
Fri, 18 May 84	Amphibious Base, San Diego, CA	Commander Jon Milliken AV: 958-9302 C: (619) 437-2302

DATE	SITE	CONTACT
Mon, 21 May 84	Camp Pendleton, CA	Major Richard Ketler AV: 993-5916 C: (714) 725-5916
Wed, 23 May 84	Treasure Island Naval Sta. San Francisco, CA	Lieutenant Commander Scott Roti AV: 869-4410 C: (415) 986-6166
Fri, 25 May 84	Naval Base, Seattle, WA	Commander Danny Barrett AV: 941-3835 C: (206) 527-3835
Wed, 31 May 84	Naval Base, Norfolk, VA	Lieutenant Mark Rosen AV: 564-7561 C: (804) 444-7561
Thurs, 31 May 84 (1230-1530) Fri, 1 Jun 84 (0930-1430)	Pentagon, Washington, D.C.	Major John Cooke AV: 225-1891 C: (202) 695-1891
Tues, 5 Jun 84	Fort Knox, KY	Major Steve Saynisch AV: 464-3544 C: (502) 624-3544
Wed, 6 Jun 84	Fort Campbell, KY	Major Mike Millard AV: 635-6161 C: (502) 798-6161
Tues, 12 Jun 84	Fort McPherson, GA	Lieutenant Colonel Mike Burke AV: 588-3836 C: (404) 752-3836
Thurs, 14 Jun 84	Maxwell AFB, AL	Lieutenant Colonel Pete Rogers AV: 875-2802 C: (205) 293-2802

MCM ON-SITE INSTRUCTION
Schedule *

0815-0915	Introduction Format; rules of construction Report of offense, apprehension; pretrial restraint
0930-1030	Disposition of offenses; commander's options Punitive articles Nonjudicial punishment
1040-1130	Summary courts-martial Preferral of charges Forwarding and disposition; Article 32 investigation; pretrial advice Convening courts-martial; detailing personnel; referral
1130-1245	Lunch
1245-1335	Pretrial procedure; trial procedure generally
1345-1435	Trial procedure—merits, sentencing adjournment
1445-1535	Posttrial procedure through action
1535-1430	Posttrial procedure, action through appeals

*This schedule is tentative and may be adjusted. It is provided now for preliminary planning purposes. The start time may be shifted by up to 30 minutes either way if circumstances require (e.g. when instructors have an evening flight to catch, or when necessary to permit attendance by those travelling to the site). Break and finish time would be shifted accordingly. We will notify the coordinator if our schedule requires a different start time. Please let us know if you consider a different start time necessary.

Military Justice Act of 1983

The Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393 (1983) is reprinted in its entirety.

An Act

To amend chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), to improve the quality and efficiency of the military justice system, to revise the laws concerning review of courts-martial, and for other purposes.

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled,

SHORT TITLE: REFERENCES TO THE UNIFORM CODE OF MILITARY JUSTICE

SECTION 1. (a) This Act may be cited as the "Military Justice Act of 1983".

(b) Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of chapter 47 of title 10, United States Code (the Uniform Code of Military Justice).

INCLUSION OF LAW SPECIALISTS OF THE COAST GUARD WITHIN DEFINITION OF JUDGE ADVOCATE

SEC. 2. (a) Clause 13 of section 801 (article 1(13)) is amended to read as follows:

"(13) 'Judge advocate' means—

"(A) an officer of the Judge Advocate General's Corps of the Army or the Navy;

"(B) an officer of the Air Force or the Marine Corps who is designated as a judge advocate; or

"(C) an officer of the Coast Guard who is designated as a law specialist".

(b) The first sentence of section 806(a) (article 6(a)) is amended by striking out "and Air Force and law specialists of the" and inserting in lieu thereof "Air Force, and".

(c) Section 815(e) (article 15(e)) is amended by striking out "of the Army, Navy, Air Force, or Marine Corps, or a law specialist or lawyer of the Coast Guard or" and inserting in lieu thereof "or a lawyer of the".

(d) Section 827 (article 27) is amended—

(1) in subsection (b)(1), by striking out "of the Army, Navy, Air Force, or Marine Corps or a law specialist of the Coast Guard,"; and

(2) in subsection (c)(3), by striking out ", or a law specialist,".

(e) Section 842(a) (article 42(a)) is amended by striking out ", law specialist," both places it appears in the third sentence.

(f) Section 936(a) (article 136(a)) is amended—

(1) in clause (1), by striking out "of the Army, Navy, Air Force, and Marine Corps"; and

(2) by striking out clause (2) and redesignating clauses (3) through (7) as clauses (2) through (6), respectively.

MATTERS RELATING TO THE MILITARY JUDGE, COUNSEL, AND MEMBERS OF THE COURT-MARTIAL

SEC. 3. (a) Section 816(1)(B) (article 16(1)(B)) is amended by inserting "orally on the record or" before "in writing".

(b) Section 825 (article 25) is amended by adding at the end thereof the following new subsection:

"(e) Before a court-martial is assembled for the trial of a case, the convening authority may excuse a member of the court from participating in the case. Under such regulations as the Secretary concerned may prescribe, the convening authority may delegate his authority under this subsection to his staff judge advocate or legal officer or to any other principal assistant.".

(c)(1) Section 826 (article 26) is amended—

(A) by striking out subsection (a) and inserting in lieu thereof the following:

"(a) A military judge shall be detailed to each general court-martial. Subject to regulations of the Secretary concerned, a military judge may be detailed to any special court-martial. The Secretary concerned shall prescribe regulations providing for the manner in which military judges are detailed for such courts-martial and for the persons who are authorized to detail military judges for such courts-martial. The military judge shall preside over each open session

of the court-martial to which he has been detailed."; and

(B) in the first sentence of subsection (c), by striking out "by the convening authority, and, unless" and inserting in lieu thereof "in accordance with regulations prescribed under subsection (a). Unless".

(2) Section 827(a) (article 27(a)) is amended—

(A) by striking out "For each" and all that follows through "appropriate." and inserting in lieu thereof the following: "(1) Trial counsel and defense counsel shall be detailed for each general and special court-martial. Assistant trial counsel and assistant and associate defense counsel may be detailed for each general and special court-martial. The Secretary concerned shall prescribe regulations providing for the manner in which counsel are detailed for such courts-martial and for the persons who are authorized to detail counsel for such courts-martial."; and

(B) by designating the sentence beginning "No person who has acted as investigating officer" as paragraph (2) and by striking out "assistant defense counsel" in such sentence and inserting in lieu thereof "assistant or associate defense counsel".

(d) Section 829(a)(article 29(a)) is amended by striking out "except for" and all that follows through the period and inserting in lieu thereof the following: "unless excused as a result of a challenge, excused by the military judge for physical disability or other good cause, or excused by order of the convening authority for good cause.".

(e)(1) Section 838(b)(6) (article 38(b)(6)) is amended by striking out "a convening authority" and inserting in lieu thereof "the person authorized under regulations prescribed under section 827 of this title (article 27) to detail counsel".

(2) Paragraph (7) of section 838(b) (article 38(b)(7)) is amended by inserting after the first sentence the following new sentence: "Such regulations may not prescribe any limitation based on the reasonable availability of counsel solely on the grounds that the counsel selected by the accused is from an armed force other than the armed force of which the accused is a member.".

(3) Section 838(c) (article 38(c)) is amended to read as follows:

"(c) In any court-martial proceeding resulting in a conviction, the defense counsel—

"(1) may forward for attachment to the record of proceedings a brief of such matters as he determines should be considered in behalf of the accused on review (including any objection to the contents of the record which he considers appropriate);

"(2) may assist the accused in the submission of any matter under section 860 of this title (article 60); and

"(3) may take other action authorized by this chapter.".

(f) Section 842(a) (article 42(a)) is amended by striking out "assistant defense counsel" in the first and third sentences and inserting in lieu thereof "assistant or associate defense counsel".

PRETRIAL ADVICE AND REFERRAL OF CHARGES

SEC. 4. (a)(1) The first sentence of section 834(a) is amended by striking out "or legal officer".

(2) The second sentence of such section is amended to read as follows: "The convening authority may not refer a specification under a charge to a general court-martial for trial unless he has been advised in writing by the staff judge advocate that—

"(1) the specification alleges an offense under this chapter;

"(2) the specification is warranted by the evidence indicated in the report of investigation under section 832 of this title (article 32) (if there is such a report); and

"(3) a court-martial would have jurisdiction over the accused and the offense.".

(b) Section 834 (article 34) is further amended by redesignating subsection (b) as subsection (c) and inserting after subsection (a) the following new subsection (b):

"(b) The advice of the staff judge advocate under subsection (a) with respect to a specification under a charge shall include a written and signed statement by the staff judge advocate—

"(1) expressing his conclusions with respect to each matter set forth in subsection (a); and

"(2) recommending action that the convening authority take regarding the specification.

If the specification is referred for trial, the recommendation of the staff judge advocate shall accompany the specification.".

RIGHT TO APPEAL AND RELATED MATTERS

SEC. 5. (a)(1) Section 860 (article 60) is amended to read as follows:

"§ 860. Art. 60. Action by the convening authority

"(a) The findings and sentence of a court-martial shall be reported promptly to the convening authority after the announcement of the sentence.

"(b)(1) Within 30 days after the sentence of a general court-martial or of a special court-martial which has adjudged a bad-conduct discharge has been announced, the accused may submit to the convening authority matters for consideration by the convening authority with respect to the findings and the sentence. In the case of all other special courts-martial, the accused may make such a submission to the convening authority within 20 days after the sentence is announced. In the case of all summary courts-martial the accused may make such a submission to the convening authority within seven days after the sentence is announced. If the accused shows that additional time is required for the accused to submit such matters, the convening authority or other person taking action under this section, for good cause, may extend the period—

"(A) in the case of a general court-martial or a special court-martial which has adjudged a bad-conduct discharge, for not more than an additional 20 days; and

"(B) in the case of all other courts-martial, for not more than an additional 10 days.

"(2) In a summary court-martial case the accused shall be promptly provided a copy of the record of trial for use in preparing a submission authorized by paragraph (1).

"(3) In no event shall the accused in any general or special court-martial case have less than a seven-day period after the day on which a copy of the authenticated record of trial has been given to him within which to make a submission under paragraph (1). The convening authority or other person taking action on the case, for good cause, may extend this period for up to an additional 10 days.

"(4) The accused may waive his right to make a submission to the convening authority under paragraph (1). Such a waiver must be made in writing and may not be revoked. For the purposes of subsection (c)(2), the time within which the accused may make a submission under this subsection shall be deemed to have expired upon the submission of such a waiver to the convening authority.

"(c)(1) The authority under this section to modify the findings and sentence of a court-martial is a matter of command prerogative involving the sole discretion of the convening authority. Under regulations of the Secretary concerned, a commissioned officer commanding for the time being, a successor in command, or any person exercising general court-martial jurisdiction may act under this section in place of the convening authority.

"(2) Action on the sentence of a court-martial shall be taken by the convening authority or by another person authorized to act under this section. Subject to regulations of the Secretary concerned, such action may be taken only after consideration of any matters submitted by the accused, under subsection (b) and, if applicable, under subsection (d), or after the time for submitting such matters expires, whichever is earlier. The convening authority or other person taking such action, in his sole discretion, may approve, disapprove, commute, or suspend the sentence in whole or in part.

"(3) Action on the findings of a court-martial by the convening authority or other person acting on the sentence is not required. However, such person, in his sole discretion, may—

"(A) dismiss any charge or specification by setting aside a finding of guilty thereto; or

"(B) change a finding of guilty to a charge or specification to a finding of guilty to an offense that is a lesser included offense of the offense stated in the charge or specification.

"(d) Before acting under this section on any general court-martial case or any special court-martial case that includes a bad-conduct discharge, the convening authority or other person taking action under this section shall obtain and consider the written recommendation of his staff judge advocate or legal officer. The convening authority or other person taking action under this section shall refer the record of trial to his staff judge advocate or legal officer, and the staff judge advocate or legal officer shall use such record in the preparation of his recommendation. The recommendation of the staff judge advocate or legal officer shall include such matters as the President may prescribe by regulation and shall be served on the accused, who shall have five days from the date of receipt in which to submit any matter in response. The convening authority or other person taking action under this section, for good cause, may extend that period for up to an additional 20 days. Failure to object in the response to the recommendation or to any matter attached to

the recommendation waives the right to object thereto.

"(e)(1) The convening authority or other person taking action under this section, in his sole discretion, may order a proceeding in revision or a rehearing.

"(2) A proceeding in revision may be ordered if there is an apparent error or omission in the record or if the record shows improper or inconsistent action by a court-martial with respect to the findings or sentence that can be rectified without material prejudice to the substantial rights of the accused. In no case, however, may a proceeding in revision—

"(A) reconsider a finding of not guilty of any specification or a ruling which amounts to a finding of not guilty;

"(B) reconsider a finding of not guilty of any charge, unless there has been a finding of guilty under a specification laid under that charge, which sufficiently alleges a violation of some article of this chapter; or

"(C) increase the severity of the sentence unless the sentence prescribed for the offense is mandatory.

"(3) A rehearing may be ordered by the convening authority or other person taking action under this section if he disapproves the findings and sentence and states the reasons for disapproval of the findings. If such person disapproves the findings and sentence and does not order a rehearing, he shall dismiss the charges. A rehearing as to the findings may not be ordered where there is a lack of sufficient evidence in the record to support the findings. A rehearing as to the sentence may be ordered if the convening authority or other person taking action under this subsection disapproves the sentence.".

(2) The item relating to such section (article) in the table of sections at the beginning of subchapter IX is amended to read as follows:

"860. 60. Action by the convening authority.".

(b)(1) Section 861 (article 61) is amended to read as follows:

"§ 861. Art. 61. Waiver or withdrawal of appeal

"(a) In each case subject to appellate review under section 866 or 869(a) of this title (article 66 or 69(a)), except a case in which the sentence as approved under section 860(c) of this title (article 60(c)) includes death, the accused may file with the convening authority a statement expressly waiving the right of the accused to such review. Such a waiver shall be signed by both the accused and by defense counsel and must be filed within 10 days after the action under section 860(c) of this title (article 60(c)) is served on the accused or on defense counsel. The convening authority or other person taking such action, for good cause, may extend the period for such filing by not more than 30 days.

"(b) Except in a case in which the sentence as approved under section 860(c) of this title (article 60(c)) includes death, the accused may withdraw an appeal at any time.

"(c) A waiver of the right to appellate review or the withdrawal of an appeal under this section bars review under section 866 or 869(a) of this title (article 66 or 69(a)).".

(2) The item relating to such section (article) in the table of sections at the beginning of subchapter IX is amended to read as follows:

"861. 61. Waiver or withdrawal of appeal.".

(c)(1) Section 862 (article 62) is amended to read as follows:

"§ 862. Art. 62. Appeal by the United States

"(a)(1) In a trial by court-martial in which a military judge presides and in which a punitive discharge may be adjudged, the United States may appeal an order or ruling of the military judge which terminates the proceedings with respect to a charge or specification or which excludes evidence that is substantial proof of a fact material in the proceeding. However, the United States may not appeal an order or ruling that is, or that amounts to, a finding of not guilty with respect to the charge or specification.

"(2) An appeal of an order or ruling may not be taken unless the trial counsel provides the military judge with written notice of appeal from the order or ruling within 72 hours of the order or ruling. Such notice shall include a certification by the trial counsel that the appeal is not taken for the purpose of delay and (if the order or ruling appealed is one which excludes evidence) that the evidence excluded is substantial proof of a fact material in the proceeding.

"(3) An appeal under this section shall be diligently prosecuted by appellate Government counsel.

"(b) An appeal under this section shall be forwarded by a means prescribed under regulations of the President directly to the Court of Military

Review and shall, whenever practicable, have priority over all other proceedings before that court. In ruling on an appeal under this section, the Court of Military Review may act only with respect to matters of law, notwithstanding section 866(c) of this title (article 66(c)).

"(c) Any period of delay resulting from an appeal under this section shall be excluded in deciding any issue regarding denial of a speedy trial unless an appropriate authority determines that the appeal was filed solely for the purpose of delay with the knowledge that it was totally frivolous and without merit.".

(2) The item relating to such section (article) in the table of sections at the beginning of subchapter IX is amended to read as follows:

"862. 62. Appeal by the United States.".

(d) Section 863 (article 63) is amended—

(1) by striking out subsection (a); and

(2) in subsection (b)—

(A) by striking out "(b)";

(B) by inserting "under this chapter" after "Each rehearsing"; and

(C) by inserting at the end thereof the following: "If the sentence approved after the first court-martial was in accordance with a pretrial agreement and the accused at the rehearing changes his plea with respect to the charges or specifications upon which the pretrial agreement was based, or otherwise does not comply with the pretrial agreement, the sentence as to those charges or specifications may include any punishment not in excess of that lawfully adjudged at the first court-martial.".

(e) Section 871 (article 71) is amended—

(1) by striking out subsection (a) and inserting in lieu thereof the following:

"(a) If the sentence of the court-martial extends to death, that part of the sentence providing for death may not be executed until approved by the President. In such a case, the President may commute, remit, or suspend the sentence, or any part thereof, as he sees fit. That part of the sentence providing for death may not be suspended.";

(2) in subsection (b), by striking out the first and second sentences and inserting in lieu thereof the following: "If in the case of a commissioned officer, cadet, or midshipman, the sentence of a court-martial extends to dismissal, that part of the sentence providing for dismissal may not be executed until approved by the Secretary concerned or such Under Secretary or Assistant Secretary as may be designated by the Secretary concerned. In such a case, the Secretary, Under Secretary, or Assistant Secretary, as the case may be, may commute, remit, or suspend the sentence, or any part of the sentence, has he sees fit."; and

(3) by striking out subsections (c) and (d) and inserting in lieu thereof the following:

"(c)(1) If a sentence extends to death, dismissal, or a dishonorable or bad conduct discharge and if the right of the accused to appellate review is not waived, and an appeal is not withdrawn, under section 861 of this title (article 61), that part of the sentence extending to death, dismissal, or a dishonorable or bad-conduct discharge may not be executed until there is a final judgment as to the legality of the proceedings (and with respect to death or dismissal, approval under subsection (a) or (b), as appropriate). A judgment as to legality of the proceedings is final in such cases when review is completed by a Court of Military Review and—

"(A) the time for the accused to file a petition for review by the Court of Military Appeals has expired and the accused has not filed a timely petition for such review and the case is not otherwise under review by that Court;

"(B) such a petition is rejected by the Court of Military Appeals; or

"(C) review is completed in accordance with the judgment of the Court of Military Appeals and—

"(i) a petition for a writ of certiorari is not filed within by the limits prescribed by the Supreme Court;

"(ii) such a petition is rejected by the Supreme Court; or

"(iii) review is otherwise completed in accordance with the judgment of the Supreme Court.

"(2) If a sentence extends to dismissal or a dishonorable or bad conduct discharge and if the right of the accused to appellate review is waived, or an appeal is withdrawn, under section 861 of this title (article 61), that part of the sentence extending to dismissal or a bad-conduct or dishonorable discharge may not be executed until review of the case by a judge advocate (and any action on that review) under section 864 of this title (article 64) is completed. Any other part of a court-martial sentence may be ordered executed by the convening authority or other person acting on the case under section 860 of this title (article 60) when approved by him under that section.

"(d) The convening authority or other person acting on the case under section 860 of this title (article 60) may suspend the execution of any sentence or part thereof, except a death sentence.".

(f) Subsection (a) of section 857 (article 57(a)) is amended to read as follows:

"(a) No forfeiture may extend to any pay or allowances accrued before the date on which the sentence is approved by the person acting under section 860(c) of this title (article 60(c)).".

(g) Section 876a (article 76a) is amended—

(1) by striking out "864 or 865 of this title (article 64 or 65) by the officer exercising general court-martial jurisdiction" and inserting in lieu thereof "860 of this title (article 60)"; and

(2) by striking out "by the officer exercising general court-martial jurisdiction" in the second sentence and inserting in lieu thereof "under section 860 of this title (article 60)".

(h)(1) The table of subchapters at the beginning of chapter 47 is amended by striking out the item relating to subchapter IX and inserting in lieu thereof the following:

"IX. Port-trial Procedure and Review of Court-Martial .. 859 59".

(2) The subchapter heading at the beginning of subchapter IX is amended to read as follows:

"SUBCHAPTER IX—POST-TRIAL PROCEDURE AND REVIEW OF COURTS-MARTIAL".

RECORD OF TRIAL

SEC. 6. (a) Section 801 (article 1) is amended by adding at the end thereof the following new clause:

"(14) 'Record', when used in connection with the proceedings of a court-martial, means—

"(A) an official written transcript, written summary, or other writing relating to the proceedings; or

"(B) an official audiotape, videotape, or similar material from which sound, or sound and visual images, depicting the proceedings may be reproduced.".

(b) Subsections (d) and (f) of section 849 (article 49) are each amended by inserting after "read in evidence" the following: "or, in the case of audiotape, videotape, or similar material, may be played in evidence".

(c) Section 854 (article 54) is amended—

(1) in subsection (a), by striking out the last sentence;

(2) in subsection (b), by striking out "shall contain the matter and";

(3) by redesignating subsection (c) as subsection (d); and

(4) by inserting after subsection (b) the following new subsection:

"(c)(1) A complete record of the proceedings and testimony shall be prepared—

"(A) in each general court-martial case in which the sentence adjudged includes death, a dismissal, a discharge, or (if the sentence adjudged does not include a discharge) any other punishment which exceeds that which may otherwise be adjudged by a special court-martial; and

"(B) in each special court-martial case in which the sentence adjudged includes a bad-conduct discharge.

"(2) In all other court-martial cases, the record shall contain such matters as may be prescribed by regulations of the President.".

(d)(1) Section 865 (article 65) is amended to read as follows:

"§ 865. Art. 65. Disposition of records

"(a) In a case subject to appellate review under section 866 or 869(a) of this title (article 66 or 69(a)) in which the right to such review is not waived, or an appeal is not withdrawn, under section 861 of this title (article 61), the record of trial and action thereon shall be transmitted to the Judge Advocate General for appropriate action.

"(b) Except as otherwise required by this chapter, all other records of trial and related documents shall be transmitted and disposed of as the Secretary concerned may prescribe by regulation.".

(2) The item relating to such section (article) in the table of sections at the beginning of subchapter IX is amended to read as follows:

"865. 65. Disposition of records.".

REVIEW OF COURTS-MARTIAL AND RELATED MATTERS

SEC. 7. (a)(1) Section 864 (article 64) is amended to read as follows:

"§ 864. Art. 64. Review by a judge advocate

"(a) Each case in which there has been a finding of guilty that is not reviewed under section 866 or 869(a) of this title (article 66 or 69(a)) shall be reviewed by a judge advocate under regulations of the Secretary concerned. A judge advocate may not review a case under this subsection if he has acted in the same case as an accuser, investigating officer, member of the court, military judge, or counsel or has otherwise acted on behalf of the prosecution or defense. The judge advocate's review shall be in writing and shall contain the following:

"(1) Conclusions as to whether—

"(A) the court had jurisdiction over the accused and the offense;

"(B) the charge and specification stated an offense; and

"(C) the sentence was within the limits prescribed as a matter of law.

"(2) A response to each allegation of error made in writing by the accused.

"(3) If the case is sent for action under subsection (b), a recommendation as to the appropriate action to be taken and an opinion as to whether corrective action is required as a matter of law.

"(b) The record of trial and related documents in each case reviewed under subsection (a) shall be sent for action to the person exercising general court-martial jurisdiction over the accused at the time the court was convened (or to that person's successor in command) if—

"(1) the judge advocate who reviewed the case recommends corrective action;

"(2) the sentence approved under section 860(c) of this title (article 60(c)) extends to dismissal, a bad-conduct or dishonorable discharge, or confinement for more than six months; or

"(3) such action is otherwise required by regulations of the Secretary concerned.

"(c)(1) The person to whom the record of trial and related documents are sent under subsection (b) may—

"(A) disapprove or approve the findings or sentence, in whole or in part;

"(B) remit, commute, or suspend the sentence in whole or in part;

"(C) except where the evidence was insufficient at the trial to support the findings, order a rehearing on the findings, on the sentence, or on both; or

"(D) dismiss the charges.

"(2) If a rehearing is ordered but the convening authority finds a rehearing impracticable, he shall dismiss the charges.

"(3) If the opinion of the judge advocate in the judge advocate's review under subsection (a) is that corrective action is required as a matter of law and if the person required to take action under subsection (b) does not take action that is at least as favorable to the accused as that recommended by the judge advocate, the record of trial and action thereon shall be sent to the Judge Advocate General for review under section 869(b) of this title (article 69(b)).".

(2) The item relating to such section (article) in the table of sections at the beginning of subchapter IX is amended to read as follows:

"864. 64. Review by a judge advocate.".

(b) Section 866(a) (article 66(a)) is amended by inserting after the second sentence the following new sentence: "Any decision of a panel may be reconsidered by the court sitting as a whole in accordance with such rules.".

(c) Section 866(b) (article 66(b)) is amended

"(b) The Judge Advocate General shall refer to a Court of Military Review the record in each case of trial by court-martial—

"(1) in which the sentence, as approved, extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more; and

"(2) except in the case of a sentence extending to death, the right to appellate review has not been waived or an appeal has not been withdrawn under section 861 of this title (article 61).".

(d) Section 867(b)(1) (article 67(b)(1)) is amended by striking out "affects a general or flag officer or".

(e)(1) The text of section 869 (article 69) is amended to read as follows:

"(a) The record of trial in each general court-martial that is not otherwise reviewed under section 866 of this title (article 66) shall be examined in the office of the Judge Advocate General if there is a finding of guilty and the accused does not waive or withdraw his right to appellate review under section 861 of this title (article 61). If any part of the findings or sentence is found to be unsupported in law or if reassessment of the sentence is appropriate, the Judge Advocate General may modify or set aside the findings or sentence or both. If the Judge Advocate General so directs, the record shall be reviewed by a Court of Military Review

under section 866 of this title (article 66), but in that event there may be no further review by the Court of Military Appeals except under section 867(b)(2) of this title (article 67(b)(2)).

"(b) The findings or sentence, or both, in a court-martial case not reviewed under subsection (a) or under section 866 of this title (article 66) may be modified or set aside, in whole or in part, by the Judge Advocate General on the ground of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence. If such a case is considered upon application of the accused, the application must be filed in the office of the Judge Advocate General by the accused on or before the last day of the two-year period beginning on the date the sentence is approved under section 860(c) of this title (article 60(c)), unless the accused establishes good cause for failure to file within that time.

"(c) If the Judge Advocate General sets aside the findings or sentence, he may, except when the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If he sets aside the findings and sentence and does not order a rehearing, he shall order that the charges be dismissed. If the Judge Advocate General orders a rehearing but the convening authority finds a rehearing impractical, the convening authority shall dismiss the charges.".

(2) The two-year period specified under the second sentence of section 869(b) (article 69(b)) of title 10, United States Code, as amended by paragraph (1), does not apply to any application filed in the office of the appropriate Judge Advocate General (as defined in section 801(1) of such title) on or before October 1, 1983. The application in such a case shall be considered in the same manner and with the same effect as if such two-year period had not been enacted.

INCLUSION OF CONTROLLED SUBSTANCES IN PUNITIVE ARTICLES

SEC. 8. (a) Subchapter X is amended by inserting after section 912 (article 112) the following new section (article):

"§ 912a. Art. 112a. Wrongful use, possession, etc., of controlled substances

"(a) Any person subject to this chapter who wrongfully uses, possesses, manufactures, distributes, imports into the customs territory of the United States, exports from the United States, or introduces into an installation, vessel, vehicle, or aircraft used by or under the control of the armed forces a substance described in subsection (b) shall be punished as a court-martial may direct.

"(b) The substances referred to in subsection (a) are the following:

"(1) Opium, heroin, cocaine, amphetamine, lysergic acid diethylamide, methamphetamine, phencyclidine, barbituric acid, and marijuana and any compound or derivative of any such substance.

"(2) Any substance not specified in clause (1) that is listed on a schedule of controlled substances prescribed by the President for the purposes of this article.

"(3) Any other substance not specified in clause (1) or contained on a list prescribed by the President under clause (2) that is listed in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812).".

(b) The table of sections at the beginning of such subchapter is amended by inserting after the item relating to section 912 (article 112) the following new item:

"912a. 112a. Wrongful use, possession, etc., of controlled substances.".

THE CODE COMMITTEE

SEC. 9. (a) Section 867(g) (article 67(g)) is amended—

(1) by striking out "The Court of Military Appeals" and all that follows through "and report" and inserting in lieu thereof "(1) A committee consisting of the judges of the Court of Military Appeals, the Judge Advocates General of the Army, Navy, and Air Force, the Chief Counsel of the Coast Guard, the Director, Judge Advocate Division, Headquarters, United States Marine Corps, and two members of the public appointed by the Secretary of Defense shall meet at least annually. The committee shall make an annual comprehensive survey of the operation of this chapter. After each such survey, the committee shall report";

(2) by adding at the end thereof the following:

"(2) Each member of the committee appointed by the Secretary of Defense shall be a recog-

nized authority in military justice or criminal law. Each such member shall be appointed for a term of three years.

"(3) The Federal Advisory Committee Act (5 U.S.C. App. I) shall not apply to the committee.".

(b)(1) The Secretary of Defense shall establish a commission to study and make recommendations concerning the following matters:

(A) Whether the sentencing authority in court-martial cases should be exercised by a military judge in all noncapital cases to which a military judge has been detailed.

(B) Whether military judges and the Courts of Military Review should have the power to suspend sentences.

(C) Whether the jurisdiction of the special court-martial should be expanded to permit adjudgment of sentences including confinement of up to one year, and what, if any, changes should be made to current appellate jurisdiction.

(D) Whether military judges, including those presiding at special and general courts-martial and those sitting on the Courts of Military Review, should have tenure.

(E) What should be the elements of a fair and equitable retirement system for the judges of the United States Court of Military Appeals.

(2) The commission shall consist of nine members, at least three of whom shall be persons from private life who are recognized authorities in military justice or criminal law.

(3) The commission shall prepare a comprehensive report in support of its recommendations on the matters set forth in paragraph (1). The commission shall include in such report its findings and comments on the following matters:

(A) The experience in the civilian sector with jury sentencing and judge-alone sentencing, with particular reference to consistency, uniformity, sentence appropriateness, efficiency in the sentencing process, and impact on the rights of the accused.

(B) The potential impact of mandatory judge-alone sentencing on the Armed Forces, with particular reference to consistency, uniformity, sentence appropriateness, efficiency in the sentencing process, impact on the rights of the accused, effect on the participation of members of the Armed Forces in the military justice system, impact on relationships between judge advocates and other members of the Armed Forces, and impact on the perception of the military justice system by members of the Armed Forces, the legal profession, and the general public.

(C) The likelihood of a reduction in the number of general court-martial cases in the event the confinement jurisdiction of the special court-martial is expanded; the additional protections that should be afforded the accused if such jurisdiction is expanded; whether the minimum number of members prescribed by law for a special court-martial should be increased; and whether the appellate review process should be modified so that a greater number of cases receive review by the military appellate courts, in lieu of legal reviews presently conducted in the offices of the Judge Advocate General and elsewhere, especially if the commission determines that the special court-martial jurisdiction should be expanded.

(D) The effectiveness of the present systems for maintaining the independence of military judges and what, if any, changes are needed in these systems to ensure maintenance of an independent military judiciary, including a term of tenure for such judges consistent with efficient management of military judicial resources.

(4) The commission shall transmit its report to the Committees on Armed Services of the Senate and the House of Representatives and to the committee established under section 867(g) (article 67(g)) of title 10, United States Code, not later than the first day of the ninth calendar month that begins after the date of the enactment of this Act. Not later than the first day of the third calendar month that begins after receipt of such report, the committee established under section 867(g) (article 67(g)) of such title shall submit such comments on the report as it considers appropriate to the Committees on Armed Services of the Senate and the House of Representatives and to the Secretary of Defense, the Secretaries of the military departments, and the Secretary of Transportation.

(5) The Secretary of Defense shall ensure that the commission is provided with appropriate and adequate office space, together with such equipment, office supplies, and communications facilities and services as may be necessary for the operation of such offices, and shall provide necessary maintenance services for such offices and the equipment and facilities located therein.

(6) The Secretary shall ensure that the commission has reasonable access to information

relevant to the study.

SUPREME COURT REVIEW

SEC. 10. (a)(1) Chapter 81 of title 28, United States Code, is amended by adding at the end thereof the following new section:

"§ 1259. Court of Military Appeals; certiorari

"Decisions of the United States Court of Military Appeals may be reviewed by the Supreme Court by writ of certiorari in the following cases:

"(1) Cases reviewed by the Court of Military Appeals under section 867(b)(1) of title 10.

"(2) Cases certified to the Court of Military Appeals by the Judge Advocate General under section 867(b)(2) of title 10.

"(3) Cases in which the Court of Military Appeals granted a petition for review under section 867(b)(3) of title 10.

"(4) Cases, other than those described in paragraphs (1), (2), and (3) of this subsection, in which the Court of Military Appeals granted relief.".

(2) The table of sections at the beginning of chapter 81 of such title is amended by adding at the end thereof the following new item:

"1259. Court of Military Appeals; certiorari.".

(b) Section 2101 of title 28, United States Code, is amended by adding at the end thereof the following new subsection:

"(g) The time for application for a writ of certiorari to review a decision of the United States code of Military Appeals shall be as prescribed by rules of the Supreme Court.".

(c)(1) Section 866(e) (article 66(e)) is amended by striking out "or the Court of Military Appeals" and inserting in lieu thereof "the Court of Military Appeals, or the Supreme Court".

(2) Section 867 (article 67) is amended by adding at the end thereof the following new subsection:

"(h)(1) Decisions of the Court of Military Appeals are subject to review by the Supreme Court by writ of certiorari as provided in section 1259 of title 28. The Supreme Court may not review by a writ of certiorari under such section any action of the Court of Military Appeals in refusing to grant a petition for review.

"(2) The accused may petition the Supreme Court for a writ of certiorari without prepayment of fees and costs or security therefor and without filing the affidavit required by section 1915(a) of title 28.".

(3)(A) Section 870(b) (article 70(b)) is amended by adding at the end thereof the following new sentence: "Appellate Government counsel may represent the United States before the Supreme Court in cases arising under this chapter when requested to do so by the Attorney General.".

(B) Subsections (c) and (d) of such section are amended to read as follows:

"(c) Appellate defense counsel shall represent the accused before the Court of Military Review, the Court of Military Appeals, or the Supreme Court—

"(1) when requested by the accused;

"(2) when the United States is represented by counsel; or

"(3) when the Judge Advocate General has sent the case to the Court of Military Appeals.

"(d) The accused has the right to be represented before the Court of Military Review, the Court of Military Appeals, or the Supreme Court by civilian counsel if provided by him.".

CORRECTION OF RECORDS; DISCHARGE REVIEW

SEC. 11. (a) Section 1552 of title 10, United States Code, is amended by adding at the end thereof the following new subsection:

"(f) With respect to records of courts-martial and related administrative records pertaining to court-martial cases tried or reviewed under chapter 47 of this title (or under the Uniform Code of Military Justice (Public Law 506 of the 81st Congress)), action under subsection (a) may extend only to—

"(1) correction of a record to reflect actions taken by reviewing authorities under chapter 47 of this title (or under the Uniform Code of Military Justice (Public Law 506 of the 81st Congress)); or

"(2) action on the sentence of a court-martial for purposes of clemency.".

(b) Section 1553 of such title is amended by adding at the end of subsection (a) the following new sentence: "With respect to a discharge or dismissal adjudged by a court-martial case tried or reviewed under chapter 47 of this title (or under the Uniform Code of Military Justice (Public Law 506 of the 81st Congress)), action under this subsection may extend only to a change in the discharge or dismissal or issuance

of a new discharge for purposes of clemency.".

EFFECTIVE DATE; CONFORMING AMENDMENT

SEC. 12. (a)(1) The amendments made by this Act shall take effect on the first day of the eighth calendar month that begins after the date of enactment of this Act, except that the amendments made by sections 9, 11 and 13 shall be effective on the date of the enactment of this Act. The amendments made by section 11 shall only apply with respect to cases filed after the date of enactment of this Act with the boards established under sections 1552 and 1553 of title 10, United States Code.

(2) The amendments made by section 3(c) and 3(e) do not affect the designation or detail of a military judge or military counsel to a court-martial before the effective date of such amendments.

(3) The amendments made by section 4 shall not apply to any case in which charges were referred to trial before the effective date of such amendments, and proceedings in any such case shall be held in the same manner and with the same effect as if such amendments had not been enacted.

(4) The amendments made by sections 5, 6, and 7 shall not apply to any case in which the findings and sentence were adjudged by a court-martial before the effective date of such amendments. The proceedings in any such case shall be held in the same manner and with the same effect as if such amendments had not been enacted.

(5) The amendments made by section 8 shall not apply to any offense committed before the effective date of such amendments. Nothing in this provision shall be construed to invalidate the prosecution of any offense committed before the effective date of such amendments.

(b) Section 7(b)(1) of the Military Justice Amendments of 1981 (95 Stat. 1089; 10 U.S.C. 706 note) is amended to read as follows:

"(b)(1) The amendments made by section 2 shall apply to each member whose sentence by court-martial is approved on or after January 20, 1982—

"(A) under section 864 or 865 (article 64 or 65) of title 10, United States Code, by the officer exercising general court-martial jurisdiction under the provisions of such section as it existed on the day before the effective date of the Military Justice Act of 1983; or

"(B) under section 860 (article 60) of title 10, United States Code, by the officer empowered to act on the sentence on or after the effective date of the Military Justice Act of 1983.".

TECHNICAL AMENDMENTS TO UNIFORM CODE OF MILITARY JUSTICE

SEC. 13. (a)(1) Clauses (11) and (12) of subsection (a) of section 802 (article 802) are amended—

(A) by striking out "the following:"; and

(B) by inserting "the Commonwealth of" before "Puerto Rico".

(2) Subsection (b) of such section (article) is amended by striking out "of this section".

(b)(1) The heading of section 815 (article 15) is amended to read as follows:

"§ 815. Art. 15. Commanding officer's non-judicial punishment".

(2) Subsection (b) of such section (article) is amended—

(A) by striking out "of this section"; and

(B) by striking out "subsection (b)(2)(A)" in clause (2)(H)(i) and inserting in lieu thereof "clause (A)".

(c) Section 825(c)(2) (article 25(c)(2)) is amended by striking out "the word".

(d) Section 867(a)(3) (article 867(a)(3)) is amended by inserting "Circuit" after "District of Columbia".

JAGC History Update

Every five years, the Editor of the *Military Law Review* is required to compile an update of the history of the Judge Advocate General's Corps. The last update was accomplished in 1982 and can be found in volume 96 of the *Review*. The next update will be published in 1987. The file for that update is now open. Members of the Corps are invited to submit accounts of significant activities of the JAG Corps for inclusion. Such activities could include JAG participation in major military operations, significant JAGC personnel or structural changes, the impact of major court decisions or administrative policies, and new methods for

the effective delivery of legal services to members of the Army. Submissions should be sent to: Editor, *Military Law Review*, The Judge Advocate General's School, US Army, Charlottesville, Virginia 22901.

Judiciary Notes

US Army Judiciary, USALSA

Digest—Article 69, UCMJ, Applications

1. A recent application under the provisions of article 69, UCMJ, *Robinson*, SPCM 1983/5464, involved the admissibility of copies of records of non-judicial punishment (DA Forms 2627 and 2727-2). Over defense objections, the military judge, sitting alone, admitted the two documents during the sentencing portion of the trial. Trial defense counsel argued that the DA Form 2627 indicated that it was to be filed in the accused's restricted OMPF fiche, therefore, the government was in effect maintaining unlawful records by its use of the forms for the purpose intended. The military judge also permitted CPT B, the accused's company commander, to testify as to the procedures he utilized in taking the actions reflected in the DA Forms 2627 and 2627-2.

Relief was denied in this case because the two documents in question were properly admitted into evidence. Para. 75*b*(2), MCM 1969 (Rev.), permits the prosecution to obtain and introduce evidence of prior punishment under article 15, UCMJ, provided it is authorized to do so by departmental regulations and the records are maintained in accordance with those regulations.

The trial counsel may present in aggravation "any personnel records that reflect the past conduct and performance of the accused made or maintained according to departmental regulations.... These records may include personnel records contained in the OMPF or located elsewhere, unless prohibited by law or other regulations." *See* AR 27-10, para. 5-25. This regulation authority merely contains non-exclusive examples of some of the personnel records that may be offered by the trial counsel.

Further, the records of proceedings under article 15 that are directed for filing in the restricted fiche are maintained in the unit personnel files and destroyed at the expiration of two years from the date of the punishment. *See* AR 27-10, paras. 3-37*c*(2), 3-38*c*(2). The apparent rationale for this provision is to enable the command to monitor the soldier's rehabilitative efforts or lack thereof for a given period. Logically, a copy of the record of the proceedings should be available for aggravation purposes at a court-martial involving the soldier during the two-year period.

Regarding the testimony of CPT B, he could properly testify as the commander who imposed the punishments in order to establish the reliability of the proffered records for admissibility purposes. *See* United States v. McGill, 15 M.J. 242 (C.M.A. 1983); United States v. Mack, 9 M.J. 300 (C.M.A. 1980).

2. The case of *Morton*, SUMCM 1983/5444, involved the issue of whether the accused voluntarily, knowingly and intelligently consented to the jurisdiction of the summary court-martial to try him. *See* United States v. Booker, 5 M.J. 238 (C.M.A. 1977).

According to the undisputed facts in this case, the summary court officer advised the accused that he could object to trial by summary court-martial at anytime prior to the announcement of findings. The accused consented to trial, but conditioned his consent on the advice that he received from the summary court officer.

Prior to the announcement of findings, the accused objected to the trial and so indicated on page 4 of the charge sheet (DD Form 458). The summary court office, however, went ahead with the proceedings based on the advice of a judge advocate that the accused's objection, occurring after the plea was entered, was too late.

Relief was granted on the basis that the accused's consent to trial was not voluntary, knowing, and intelligent because it was condi-

tioned on the incorrect advice of the summary court officer. It was determined that fundamental fairness mandated that the accused, a specialist four, not be penalized for following the advice he received from an officer exercising a judicial function.

Regulatory Law Item

Regulatory Law Office, USALSA

Reports to Regulatory Law Office

Pursuant to AR 27-40, judge advocates and legal advisors are reminded of the requirement to report the existence of any legal proceeding involving telecommunications, transportation, utility services or environmental law matters that affect the Army to the Regulatory Law Office. The address is U.S. Army Legal Services Agency, ATTN: JALS-RL, Nassif Building, Falls Church, VA 22041. The telephone numbers are AUTOVON 289-2015, Commercial (202) 756-2015.

Reserve Affairs Items

Reserve Affairs Department, TJAGSA

National Guard Hosted On-Site

This year's On-Site Technical Training Program expands the on-site role of Army National Guard judge advocates, who will participate for the first time as on-site hosts within the continental United States. Judge advocate officers of the Georgia ARNG will sponsor the Atlanta on-site during 10-11 March 1984. The program will offer presentations on military law by faculty members of The Judge Advocate General's School and will feature military and civilian dignitaries to mark the Guard's inaugural sponsorship.

The training will provide an excellent opportunity for active duty, ARNG and USAR judge advocates in Atlanta and the surrounding areas to receive an update in military law topics. The on-site location is the Atlanta Perimeter Marriott, 246 Perimeter Center Parkway NE, Atlanta, GA 30346. For further information, call MAJ Bill Doll, (404) 659-4488, or MAJ Norman Zoller, (404) 221-5724.

The Orlando on-site previously scheduled for 10-11 March 1984 has been canceled due to the presentation in Atlanta.

JAGSO Team Training 1984

The Judge Advocate General's Service Organization (JAGSO) triennial training for military law centers and legal service teams will be conducted at The Judge Advocate General's School during 18-29 June 1984. Inprocessing will take place on Sunday, 17 June 1984. Attendance is limited to commissioned officers only; alternate AT should be scheduled for warrant officers and enlisted members. The 1036th U. S. Army Reserve School (USARS), Farrell, PA, will host the training and orders should reflect assignment to the 1036th USARS, with duty station at TJAGSA. Units should forward a tentative list of members attending AT at TJAGSA to the School, ATTN: JAGS-RA (Ms. Park), as soon as possible. Final lists of attendees must be furnished by 1 March 1984. Commanders are encouraged to visit their units during the training; these visits, however, must be coordinated in advance with either Ms. Park or Captain McShane of the Reserve Affairs Department. Point of contact at TJAGSA is Ms. Lee Park, Reserve Affairs Department, at (804) 293-6121; FTS 938-1301/1209; or AUTOVON 274-7110, ext. 293-6121.

JAOAC 1984

The Judge Advocate Officer Advanced Course (JAOAC), Phase IV, will be conducted at The Judge Advocate General's School during 18-29 June 1984. Inprocessing will take place on Sunday, 17 June 1984. Transfer from JAGSO Team Training to JAOAC, Phase IV, must be accomplished prior to arrival. Transfers will not be permitted after arrival at TJAGSA. ARNG quotas are available through channels from the Education Branch, National Guard Bureau. USAR quotas are available through channels from the JAGC Personnel Management Officer, Major William Gentry, ARPERCEN. Requests for quotas must be received by 1 April 1984. For planning purposes, JAOAC, Phase IV, is scheduled to be conducted in 1985 and JAOAC, Phase II, to be taught in 1986. Point of contact at TJAGSA is Ms. Lee Park, Reserve Affairs Department, at (804) 293-6121; FTS 938-1301/1209; or AUTOVON 274-7110, ext. 293-6121.

Enlisted Update

Sergeant Major Walt Cybart

Reenlistment

Guidelines for the new reenlistment program precludes career soldiers (any enlisted other than first termers) from exercising any reenlistment option other than option 4-1 if they are on PCS assignment instructions. Career status 71Ds and 71Es are in this situation. MILPERCEN generally places soldiers on assignment instructions six months prior to DEROS. Therefore, all 71D and 71E soldiers within eight to nine months of ETS who are planning to reenlist should visit their reenlistment NCO eight and one-half months prior to ETS to "reserve" their reenlistment option. This information must be disseminated to all 71D and 71E personnel within your jurisdiction in order to insure that no soldiers get left behind.

TDS Ratings

Recently, I have been advised that some installations have completely excluded TDS members from the rating scheme for their enlisted support personnel. TDS personnel should be included somewhere within the rating chain. I would suggest the following possibility:

Rater: Chief Legal Clerk.
Indorser: Senior Defense Counsel.
Reviewer: Deputy Staff Judge Advocate.

This proposal has been discussed with and approved by Colonel Harold Miller, Chief, Trial Defense Service, USALSA.

CLE News

1. Attention Virginia Attorneys

On 12 September 1983, the Supreme Court of Virginia ordered that each active member of the Virginia State Bar, as a condition for maintaining his or her license to practice law in Virginia, attend a half-day education program focusing on the new Code of Professional Responsibility. This program will be held throughout the Commonwealth of Virginia on various dates during the period 1 January through 31 May 1984. Noncompliance with the attendance requirement will result in automatic

suspension of a lawyer's license as of 1 July 1984. For more information you may call (804) 924-3460 or write: Professional Responsibility Program, Committee on Continuing Legal Education, School of Law, University of Virginia, Charlottesville, VA 22901.

2. Mandatory Continuing Legal Education Requirements

Thirteen states currently have a mandatory continuing legal education (MCLE) requirement. The most recent jurisdiction to adopt MCLE is Georgia whose program is effective on 1 January 1984. In addition to these, MCLE is under study in Kentucky and West Virginia.

In these thirteen MCLE states all active attorneys are required to attend approved continuing legal education programs for a specified number of hours each year or over a period of years. Additionally, bar members are required to report periodically either their compliance or reason for exemption from compliance. Due to the varied MCLE programs, paragraph 7-16, Personnel Policies, October 1983, provides that staying abreast of state bar requirements is the responsibility of the individual judge advocate. State bar membership requirements and the availability of exemptions or waivers of MCLE for military personnel vary from jurisdiction to jurisdiction and are subject to change. TJAGSA *resident* CLE courses have been approved by eleven of these MCLE jurisdictions. Approved sponsor status has been applied for in Montana and Georgia.

Listed below are those jurisdictions in which some form of mandatory continuing legal education has been adopted with a brief description of the requirement, the address of the responsible local official, and the reporting date:

STATE	LOCAL OFFICIAL	PROGRAM DESCRIPTION
Alabama	MCLE Commission Alabama State Bar P.O. Box 671 Montgomery, AL 36101 (205) 269-1515	—Active attorneys must complete 12 hours of approved continuing legal education per year. Active duty military attorneys are exempt but must declare exemption annually. —Reporting date: 31 December annually
Colorado	Executive Director Colorado Supreme Court Board of Continuing Legal and Judicial Education 190 East 9th Avenue Suite 410 Denver, CO 80203 (303) 893-6842	—Active attorneys must complete 45 units of approved continuing legal education (including 2 units of legal ethics) every three years. Newly admitted attorneys must also complete 15 hours in basic legal and trial skills within three years. —Reporting date: 31 January annually

STATE	LOCAL OFFICIAL	PROGRAM DESCRIPTION
Georgia	Executive Director State Bar of Georgia 84 Peachtree Street Atlanta, GA 30303	—Active attorneys must complete 12 hours of approved continuing legal education per year. Every three years each attorney must complete six hours of legal ethics. —Reporting date: TBA.
Idaho	Idaho State Bar P.O. Box 895 204 W. State Street Boise, ID 83701 (208) 342-8959	—Active attorneys must complete 30 hours of approved continuing legal education every three years. —Reporting date: 1 March every third anniversary following admission to practice.
Iowa	Executive Secretary Iowa Commission Continuing Legal Education State Capitol Des Moines, IA 50319 (515) 281-3718	—Active attorneys must complete 15 hours of approved continuing legal education each year. —Reporting date: 1 March annually.
Minnesota	Executive Secretary Minnesota State Board Continuing Legal 875 Summitt Ave. St. Paul, MN 55105 (612) 227-5430	—Active attorneys must complete 45 hours of approved continuing legal education every three years. —Reporting date: 1 March every third year.
Montana	Director Montana Board of Continuing Legal Education P.O. Box 4669 Helena, MT 59604 (406) 442-7660	—Active attorneys must complete 15 hours of approved continuing legal education each year. —Reporting date: 1 April annually.

STATE	LOCAL OFFICIAL	PROGRAM DESCRIPTION
Nevada	Executive Director Board of Continuing Legal Education State of Nevada P.O. Box 12446 Reno, NV 89510 (702) 826-0273	—Active attorneys must complete 10 hours of approved continuing legal education each year. —Reporting date: 15 January annually.
North Dakota	Executive Director State Bar of North Dakota P.O. Box 2136 Bismark, ND 58502 (701) 255-1404	—Active attorneys must complete 45 hours of approved continuing legal education every three years. —Reporting date: 1 February submitted in three year intervals.
South Carolina	State Bar of South Carolina P.O. Box 2138 Columbia, SC 29202 (803) 799-5578	—Active attorneys must complete 12 hours of approved continuing legal education per year. Active duty military attorneys are exempt, but must declare exemption. —Reporting date: 10 January annually.
Washington	Director of Continuing Legal Education Washington State Bar Association 505 Madison Seattle, WA 98104 (206) 622-6021	—Active attorneys must complete 15 hours of approved continuing legal education per year. —Reporting date: 31 January annually.
Wisconsin	Director, Board of Attorneys Professional Competence Room 403 110E Main Street Madison, WI 53703 (608) 266-9760	—Active attorneys must complete 15 hours of approved continuing legal education per year. —Reporting date: 1 March annually.

STATE	LOCAL OFFICIAL	PROGRAM DESCRIPTION
Wyoming	Wyoming State Bar P.O. Box 109 Cheyenne, WY 82001 (307) 632-9061	—Active attorneys must complete 15 hours of approved continuing legal education per year. —Reporting date: 1 March annually.

3. U.S. Army Claims Training Workshops

The U.S. Army Claims Service (USARCS) will conduct the annual U. S. Army Claims Training Workshops at The Judge Advocate General's School, Charlottesville, VA, during 10-15 June 1984.

The principal objectives of the workshops are to present recent legal developments in the claims field, present the background and basis for policy developed by USARCS in the administration of the claims program, and to conduct training of general and specific interest to attendees. The workshops will utilize guest speakers of unique expertise; "general" sessions to present topics of interest to all; practical problems for discussion and solution in an informal, small group atmosphere; and question and answer sessions to enable attendees to discuss specific problem areas with USARCS personnel.

The Training Workshops will be conducted in three sessions:

a. Session I, Personnel Claims, Recovery and Administration, will be conducted on Monday and Tuesday, 11 and 12 June 1984, 0830-1630 hours.

b. Session II, Tort, Medical Care Recovery, Litigation, Maritime and Foreign Claims, will be conducted 13 and 14 June 1984, 0830-1630 hours.

c. Session III, Risk Management and Medical Malpractice Claims, will be conducted Friday, 15 June 1984, 0830-1630 hours.

Due to space constraints, attendance will be limited to 185 registrants for each session. Corps of Engineer (except those processing personnel claims) and National Guard personnel are limited to attendance at Session II. Registration is mandatory for each session. Registration forms may be acquired by contacting USARCS. Mrs. Audrey E. Slusher (Autovon 923-7622/7960 or Commercial (301) 677-7622/7960).

4. Resident Course Quotas

Attendance at resident CLE courses conducted at The Judge Advocate General's School is restricted to those who have been allocated quotas. Quota allocations are obtained from local training offices which receive them from the MACOMs. Reservists obtain quotas through their unit or ARPERCEN, ATTN: DARP-OPS-JA, if they are non-unit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOM and other major agency training offices. Specific questions as to the operation of the quota system may be addressed to Mrs. Kathryn R. Head, Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22901 (Telephone: AUTOVON 274-7110, extension 293-6286; commercial: (804) 293-6286; FTS: 938-1304).

5. TJAGSA CLE Course Schedule

February 6-10: 11th Criminal Trial Advocacy (5F-F32).

February 27-March 9: 98th Contract Attorneys (5F-F10).

March 5-9: 25th Law of War Workshop (5F-F42).

March 12-14: 2nd Advanced Law of War Seminar (5F-F45).

March 12-16: 14th Legal Assistance Course (5F-F23).

March 19-23: 4th Commercial Activities Program (5F-F16).

March 26-30: 7th Administrative Law for Military Installations (5F-F24).

April 2-6: 2nd Advanced Federal Litigation (5F-F29).

April 4-6: JAG USAR Workshop

April 9-13: 74th Senior Officer Legal Orientation (5F-F1).

April 16-20: 6th Military Lawyer's Assistant (512-71D/20/30).

April 16-20: 3d Contract Claims, Litigation, and Remedies (5F-F13).

April 23-27: 14th Staff Judge Advocate (5F-F52).

April 30-May 4: 1st Judge Advocate Operations Overseas (5F-F46).

April 30-May 4: 18th Fiscal Law (5F-F12).

May 7-11: 25th Federal Labor Relations (5F-F22).

May 7-18: 99th Contract Attorneys (5F-F10).

May 21-June 8: 27th Military Judge (5F-F33).

May 22-25: Chief Legal Clerks/Court Reporter Refresher Training

June 4-8: 75th Senior Officer Legal Orientation (5F-F1).

June 11-15: Claims Training Seminar.

June 18-29: JAGSO Team Training

June 18-29: JOAC: Phase IV.

July 9-13: 13th Law Office Management (7A-713A).

July 16-20: 26th Law of War Workshop (5F-F42).

July 16-27: 100th Contract Attorneys (5F-F10).

July 16-18: Professional Recruiting Training Seminar.

July 23-27: 12th Criminal Trial Advocacy (5F-F32).

July 23-September 28: 104th Basic Course (5-27-C20).

August 1-May 17 1985: 33d Graduate Course (5-27-C22).

August 20-24: 8th Criminal Law New Developments (5F-F35).

August 27-31: 76th Senior Officer Legal Orientation (5F-F1).

September 10-14: 27th Law of War Workshop (5F-F42).

October 9-12: 1984 Worldwide JAG Conference

October 15-December 14: 105th Basic Course (5-27-C20).

6. Civilian Sponsored CLE Courses

April

1-7: ATLA, Basic Course in Trial Advocacy for Women, Chicago, IL.

5: PBI, Trial Techniques, West Chester, PA.

5: CCLE, Zoning, Glenwood Spr., CO.

5-6: BNA, Employee Termination: Rights & Responsibilities, Washington, DC.

5-6: FBA, Indian Law Conference, Phoenix, AZ.

5-6: FBA, Tax Law Conference, Washington, DC.

6: GICLE, Workers Compensation for the General Practitioner, Augusta, GA.

6-7: ATLA, Retainer to Verdict, Wilmington, DE.

10: PBI, Tax Aspects of Separation & Divorce, Washington, PA.

12-13: PLI, Employees Benefits Institute, New York, NY.

12-13: PLI, Hazardous Waste Litigation 1984, New York, NY.

12-14: GICLE, Family Law Institute, St. Simons Is., GA.

13: ABICLE, Age, Race, & Sex Discrimination, Birmingham, AL.

13: SBM, General Practice, Missoula, MT.

13: GICLE, Workers Compensation for the General Practitioner, Atlanta, GA.

14: CCLE, Real Estate Tax Shelters, Cortez, CO.

20-21: KCLE, Buying & Selling a Business, Lexington, KY.

For further information on civilian courses, please contact the institution offering the course, as listed below:

AAA: American Arbitration Association, 140 West 51st Street, New York, NY 10020.

AAJE: American Academy of Judicial Education, Suite 437, 539 Woodward Building, 1426 H Street NW, Washington, DC 20005. Phone: (202) 783-5151.

ABA: American Bar Association, 1155 E. 60th Street, Chicago, IL 60637.

ABICLE: Alabama Bar Institute for Continuing Legal Education, Box CL, University, AL 35486.

AKBA: Alaska Bar Association, P.O. Box 279, Anchorage, AK 99501.

ALEHU: Advanced Legal Education, Hamline University School of Law, 1536 Hewitt Avenue, St. Paul, MN 55104.

ALIABA: American Law Institute-American Bar Association Committee on Continuing Professional Education, 4025 Chestnut Street, Philadelphia, PA 19104.

ARKCLE: Arkansas Institute for Continuing Legal Education, 400 West Markham, Little Rock, AR 72201.

ASLM: American Society of Law and Medicine, 520 Commonwealth Avenue, Boston, MA 02215.

ATLA: The Association of Trial Lawyers of America, 1050 31st St., N.W. (or Box 3717), Washington, DC 20007. Phone: (202) 965-3500.

BNA: The Bureau of National Affairs Inc., 1231 25th Street, N.W., Washington, DC 20037.

CALM: Center for Advanced Legal Management, 1767 Morris Avenue, Union, NJ 07083.

CCEB: Continuing Education of the Bar, University of California Extension, 2150 Shattuck Avenue, Berkeley, CA 94704.

CCLE: Continuing Legal Education in Colorado, Inc., University of Denver Law Center, 200 W. 14th Avenue, Denver, CO 80204.

CLEW: Continuing Legal Education for Wisconsin, 905 University Avenue, Suite 309, Madison, WI 53706.

DLS: Delaware Law School, Widener College, P.O. Box 7474, Concord Pike, Wilmington, DE 19803.

FBA: Federal Bar Association, 1815 H Street, N.W., Washington, DC 20006. Phone: (202) 638-0252.

FJC: The Federal Judicial Center, Dolly Madison House, 1520 H Street, N.W., Washington, DC 20003.

FLB: The Florida Bar, Tallahassee, FL 32304.

FPI: Federal Publications, Inc., Seminar Division Office, Suite 500, 1725 K Street NW, Washington, DC 20006. Phone: (202) 337-7000.

GICLE: The Institute of Continuing Legal Education in Georgia, University of Georgia School of Law, Athens, GA 30602.

GTULC: Georgetown University Law Center, Washington, DC 20001.

HICLE: Hawaii Institute for Continuing Legal Education, University of Hawaii School of Law, 1400 Lower Campus Road, Honolulu, HI 96822.

HLS: Program of Instruction for Lawyers, Harvard Law School, Cambridge, MA 02138.

ICLEF: Indiana Continuing Legal Education Forum, Suite 202, 230 East Ohio Street, Indianapolis, IN 46204.

ICM: Institute for Court Management, Suite 210, 1624 Market St., Denver, CO 80202. Phone: (303) 543-3063.

IED: The Institute for Energy Development, P.O. Box 19243, Oklahoma City, OK 73144.

IICLE: Illinois Institute for Continuing Legal Education, 2395 West Jefferson Street, Springfield, Illinois 62702 (Phone: (217) 787-2080).

ILT: The Institute for Law and Technology, 1926 Arch Street, Philadelphia, PA 19103.

IPT: Institute for Paralegal Training, 235 South 17th Street, Philadelphia, PA 19103.

KCLE: University of Kentucky, College of Law, Office of Continuing Legal Education, Lexington, KY 40506.

LSBA: Louisiana State Bar Association, 225 Baronne Street, Suite 210, New Orleans, LA 70112.

LSU: Center of Continuing Professional Development, Louisiana State University Law Center, Room 275, Baton Rouge, LA 70803.

MCLNEL: Massachusetts Continuing Legal Education—New England Law Institute, Inc., 133 Federal Street, Boston, MA 02108, and 1387 Main Street, Springfield, MA 01103.

MIC: Management Information Corporation, 140 Barclay Center, Cherry Hill, NJ 08034.

MICLE: Institute of Continuing Legal Education, University of Michigan Hutchins Hall, Ann Arbor, MI 48109.

MOB: The Missouri Bar Center, 326 Monroe, P.O. Box 119, Jefferson City, MO 65102.

NCAJ: National Center for Administration of Justice, Consortium of Universities of the Washington Metropolitan Area, 1776 Massachusetts Ave., NW, Washington, DC 20036. Phone: (202) 466-3920.

NCATL: North Carolina Academy of Trial Lawyers, Education Foundation Inc., P.O. Box 767, Raleigh, NC 27602.

NCCD: National College for Criminal Defense, College of Law, University of Houston, 4800 Calhoun, Houston, TX 77004.

NCDA: National College of District Attorneys, College of Law, University of Houston, Houston, TX 77004. Phone: (713) 749-1571.

NCJFCJ: National Council of Juvenile and Family Court Judges, University of Nevada, P.O. Box 8978, Reno, NV 89507.

NCLE: Nebraska Continuing Legal Education, Inc., 1019 Sharpe Building, Lincoln, NB 68508.

NCSC: National Center for State Courts, 1660 Lincoln Street, Suite 200, Denver, CO 80203.

NDAA: National District Attorneys Association, 666 North Lake Shore Drive, Suite 1432, Chicago, IL 60611.

NITA: National Institute for Trial Advocacy, William Mitchell College of Law, St. Paul, MN 55104.

NJC: National Judicial College, Judicial College Building, University of Nevada, Reno, NV 89507. Phone: (702) 784-6747.

NKUCCL: Chase Center for the Study of Public Law, Salmon P. Chase College of Law, Northern Kentucky University, Highland Heights, KY 41076. Phone: (606) 527-5444.

NLADA: National Legal Aid & Defender Association, 1625 K Street, NW, Eighth Floor, Washington, DC 20006. Phone: (202) 452-0620.

NPI: National Practice Institute Continuing Legal Education, 861 West Butler Square, 100 North 6th Street, Minneapolis, MN 55403. Phone: 1-800-328-4444 (In MN call (612) 338-1977).

NPLTC: National Public Law Training Center, 2000 P. Street, N.W., Suite 600, Washington, D.C. 20036.

NWU: Northwestern University School of Law, 357 East Chicago Avenue, Chicago, IL 60611.

NYSBA: New York State Bar Association, One Elk Street, Albany, NY 12207.

NYSTLA: New York State Trial Lawyers Association, Inc., 132 Nassau Street, New York, NY 12207.

NYULS: New York University School of Law, 40 Washington Sq. S., New York, NY 10012.

NYULT: New York University, School of Continuing Education, Continuing Education in Law and Taxation, 11 West 42nd Street, New York, NY 10036.

OLCI: Ohio Legal Center Institute, 33 West 11th Avenue, Columbus, OH 43201.

PATLA: Pennsylvania Trial Lawyers Association, 1405 Locust Street, Philadelphia, PA 19102.

PBI: Pennsylvania Bar Institute, P.O. Box 1027, 104 South Street, Harrisburg, PA 17108.

PLI: Practising Law Institute, 810 Seventh Avenue, New York, NY 10019. Phone: (212) 765-5700.

SBM: State Bar of Montana, 2030 Eleventh Avenue, P.O. Box 4669, Helena, MT 59601.

SBT: State Bar of Texas, Professional Development Program, P.O. Box 12487, Austin, TX 78711.

SCB: South Carolina Bar, Continuing Legal Education, P.O. Box 11039, Columbia, SC 29211.

SLF: The Southwestern Legal Foundation, P.O. Box 707, Richardson, TX 75080.

SMU: Continuing Legal Education, School of Law, Southern Methodist University, Dallas, TX 75275.

SNFRAN: University of San Francisco, School of Law, Fulton at Parker Avenues, San Francisco, CA 94117.

TOURO: Touro College, Continuing Education Seminar Division Office, Fifth Floor South, 1120 20th Street NW, Washington, D.C. 20036.

TUCLE: Tulane Law School, Joseph Merrick Jones Hall, Tulane University, New Orleans, LA 70118.

UDCL: University of Denver College of Law, Seminar Division Office, Fifth Floor, 1120 20th Street, N.W., Washington, DC 20036.

UHCL: University of Houston, College of Law, Central Campus, Houston, TX 77004.

UMCCLE: University of Missouri-Columbia School of Law, Office of Continuing Legal Education, 114 Tate Hall, Columbia MO 65221.

UMKC: University of Missouri-Kansas City, Law Center, 5100 Rockhill Road, Kansas City, MO 64110.

UMLC: University of Miami Law Center, P.O. Box 248087, Coral Gables, FL 33124.

UTCLE: Utah State Bar, Continuing Legal Education, 425 East First South, Salt Lake City, UT 84111.

VACLE: Joint Committee of Continuing Legal Education of the Virginia State Bar and The Virginia Bar Association, School of Law, University of Virginia, Charlottesville, VA 22901.

VUSL: Villanova University, School of Law, Villanova, PA 19085.

WSBA: Washington State Bar Association, 505 Madison Street, Seattle, WA 98104.

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are not able to attend courses in their practice areas. This need is satisfied in many cases by local reproduction of returning students' materials or by requests to the MACOM SJAs who receive

"camera ready" copies for the purpose of reproduction. However, the School still receives many requests each year for these materials. Because such distribution is not within the School's mission, TJAGSA does not have the resources to provide these publications.

In order to provide another avenue of availability, some of this material is being made available through the defense Technical Information Center (DTIC). There are two ways an office may obtain this material. The first is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. Other government agency users pay three dollars per hard copy and ninety-five cents per fiche copy. The second way is for the office or organization to become a government user. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314.

Once registered, an office or other organization may open a deposit account with the National Technical Information Center to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*.

The following TJAGSA publications are available through DTIC: (The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.)

AD NUMBER	*TITLE*
AD B077550	Criminal Law, Procedure, Pretrial Process/JAGS-ADC-83-7
AD B077551	Criminal Law, Procedure, Trial/JAGS-ADC-83-8
AD B077552	Criminal Law, Procedure, Posttrial/JAGS-ADC-83-9
AD B077553	Criminal Law, Crimes & Defenses/JAGS-ADC-83-10
AD B077554	Criminal Law, Evidence/ JAGS-ADC-83-11
AD B077555	Criminal Law, Constitutional Evidence/JAGS-ADC-83-12
AD B078201	Criminal Law, Index/JAGS-ADC-83-13
AD B078119	Contract Law, Contract Law Deskbook/JAGS-ADK-83-2
AD B078095	Contract Law, Fiscal Law Deskbook/JAGS-ADK-83-1
AD-B077738	All States Consumer Law Guide/JAGS-ADA-83-1
AD-B077739	All States Will Guide/JAGS-ADA-83-2

Those ordering publications are reminded that they are for government use only.

2. Articles

Brusick, *UN Control of Restrictive Business Practices*, 17 J. World Trade 337 (1983).

Budnitz, *Federal Regulation of Consumer Disputes in Computer Banking Transactions*, 26 Harv. J. on Legis. 31 (1983).

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3. Regulations & Pamphlets

Number	*Title*	*Change*	*Date*
AR 1-100	Gifts & Donations	Basic	15 Nov 83
AR 1-211	Attendance of Military and Civilian Personnel at Private Organization Meetings	Basic	1 Dec 83
AR 27-13	Courts of Military Review Rules of Practice and Procedure	1	27 Oct 83
AR 310-2	Identification and Distribution of DA Publications and Issue of Agency and Command Administrative Publications	Chg 5	1 Dec 83
AR 600-4	Remission or Cancellation of Indebtedness for Enlisted members	Basic	1 Dec 83
DA Pam 190-52-1	Personnel Security Precautions Against Acts of Terrorism	Basic	Jun 83
DA Pam 310-1	Consolidated Index of Army Publications and Blank Forms	Basic	1 Dec 83
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DA Pam 550-171	Zimbabwe—A Country Study	Book	1983

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JOHN A. WICKHAM, JR.
General, United States Army
Chief of Staff

Official:
ROBERT M. JOYCE
Major General, United States Army
The Adjutant General

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